Supreme Court, U.S.
FILED

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No. 02-___ 02 3 32 AUG 3 0 2002

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In The

# Supreme Court of the United States

JACK COMBS,

*Petitioner,*

v.

FAIR HOUSING OF MARIN,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a fair housing organization has established "injury in fact" sufficient for first party standing under Article III of the Constitution by proof that it voluntarily allocated some of its resources to investigate a housing provider, where there is no evidence that the housing provider's alleged misconduct had any effect on the organization's activities other than the allocation of resources to the investigation.

2. Whether a fair housing organization has established "injury in fact" sufficient for first party standing under Article III of the Constitution by proof that it voluntarily allocated some of its resources to pursue litigation against a housing provider, where there is no evidence that the housing provider's alleged misconduct had any effect on the organization's activities other than the allocation of resources to the litigation.

3. Whether a fair housing organization has established the second element of the Constitutional minima for standing, causation, by proof that it voluntarily diverted resources toward investigation or litigation against a housing provider, in response to complaints by a third party, where there is no evidence that the housing provider's alleged misconduct had any effect on the organization's activities other than the allocation of resources to the investigation or litigation.

## PARTIES TO THE PROCEEDING

The parties to this proceeding are all identified in the caption of this petition.

The Petitioner is Mr. Jack Combs, an individual, formerly doing business as Water's Edge Apartments.

The Respondent is Fair Housing of Marin, a California non-profit corporation.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Jack Combs, formerly doing business as Waters Edge Apartments, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The Ninth Circuit's opinion affirming the judgment against petitioner is published at 285 F.3d 899 (9th Cir. 2002) and also reported at 2002 U.S. App. LEXIS 6494. (App. 1-17.)

The district court's opinions are not published. However, the district court's order entering default judgment and awarding compensatory and punitive damages filed March 29, 2000 (App. 29-42), is available at 2000 U.S. Dist. LEXIS 4737.

## STATEMENT OF JURISDICTION

The decision sought to be reviewed was entered April 9, 2002 (App. 1, 46), and a timely petition for rehearing was denied on June 4, 2002. (App. 45.)

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

This case concerns Article III, section 2 of the United States Constitution, the Case or Controversy clause, which provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

42 U.S.C. § 3613(a)(1)(A) [formerly section 3612] provides in pertinent part:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than two years after the occurrence or the termination of an alleged discriminatory housing practice . . . to obtain appropriate relief with respect to such discriminatory housing practice or breach.

42 U.S.C. § 3602(i) defines the term "aggrieved person" as follows:

> (i) "Aggrieved person" includes any person who –
>
> 1. claims to have been injured by a discriminatory housing practice; or
>
> 2. believes that such person will be injured by a discriminatory housing practice that is about to occur.

## STATEMENT OF THE CASE

### 1. Summary of the Case

This action was filed by Fair Housing of Marin ("FHOM"), a California non-profit corporation that was formed for the purpose of promoting equal opportunity in housing and eliminating illegal housing discrimination. There are no other party plaintiffs. FHOM's complaint alleges that Petitioner, Jack Combs, discriminated against African Americans at Waters Edge Apartments, an 18-unit apartment building that Mr. Combs formerly owned in San Rafael, California. Mr. Combs strongly denies that he ever discriminated against African Americans. The district court had original jurisdiction over this matter under 28 U.S.C. § 1331.

Mr. Combs contends that FHOM lacks standing under Article III of the Constitution to bring this case in its own right because FHOM did not experience any "injury in fact" that was caused by Mr. Combs' alleged misconduct. FHOM claims it has standing to sue Mr. Combs because it "diverted resources" from its programs in order to investigate Mr. Combs and prosecute this lawsuit, and because in the future it might conduct outreach to counteract the alleged discrimination. However, there is no dispute that FHOM's "injuries" are self-inflicted – there is no evidence that FHOM's activities were affected in any way by Mr. Combs' alleged conduct other than the allocation of resources to the investigation and litigation. FHOM was under no legal or other compulsion to investigate or counteract Mr. Combs' alleged misconduct. FHOM voluntarily undertook these efforts. Indeed, FHOM's mission and purpose include investigation of complaints, outreach and counseling, and prosecution of litigation, and it is

funded (with grants from HUD and other sources) for these very purposes.[1]

The alleged "injury" asserted by FHOM does not establish standing under Article III. This Court has held that in order to have standing, the plaintiff must have suffered an "*injury in fact*" which is defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotes and citations omitted). Moreover, there must be a causal connection between the injury and the conduct complained of. *Id.* Voluntary decisions by an organization to investigate complaints or to pursue litigation do not satisfy this test when the organization's activities are otherwise unaffected by the defendant's conduct.

There is a deep rift among the Circuit Courts on this issue. The seminal case, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) held that a fair housing organization has standing to proceed beyond the pleadings stage if the complaint alleges that the defendant's misconduct "injured" or "impaired" the organization's ability to do its work. Subsequent decisions from the Courts of Appeals are significantly conflicted as to whether an organization's own voluntary expenditure of assets for investigation or litigation constitutes injury or impairment for purposes of standing in the absence of any other injury or impairment

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[1] FHOM received grants totaling $304,304 for the 18 month period ending June 30, 1996, out of total revenues of $360,721. (RFGN, Exh. E, p. 363.)

to the organization's activity. This conflict has resulted in a great deal of unnecessary litigation, as well as general uncertainty regarding the law in this area.

## 2. Procedural History

FHOM is a California non-profit corporation that was formed for the purpose and with the goal of promoting equal opportunity in housing and elimination of all forms of illegal housing discrimination. To this end, FHOM investigates allegations of discrimination, conducts tests to determine whether equal opportunity in housing is provided, provides outreach and education, and takes steps to assure equal opportunity in housing, including filing lawsuits such as this one.

In 1994, FHOM received complaints of discrimination at Waters Edge Apartments. Mr. Combs contends these complaints were false and fraudulent. In response, FHOM conducted tests at Waters Edge with fair housing testers. FHOM then filed an administrative complaint against Mr. Combs. In January 1997, FHOM withdrew the administrative complaint,[2] and several months later filed this civil

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[2] The reason for the withdrawl is apparent from the lead agency's (DFEH) file. On January 10, 1997, there was a meeting between DFEH's staff counsel and district administrator, and a note from this meeting states: "**[DFEH's] complaint was based on one pair of rental testing conducted on 5/16/95 and the testing was inconclusive. In addition, the tester's profile shows that the African-American tester was not discriminated [against] during the application process. Counsel Bass agreed that since no one was subject to any harm, complainant has no standing to file.**" (RFJN, Exh. B, p. 12 [emphasis added].) FHOM's motivation for withdrawing the administrative complaint is obvious – they were

(Continued on following page)

action. In its complaint, FHOM alleges that Mr. Combs discriminated against African Americans, and, as is typical in these suits, FHOM's complaint alleges that ***it*** was injured by Mr. Combs' alleged discriminatory misconduct:

> By reason of the defendant's unlawful acts and practices, FHOM has suffered injury to its ability to carry out its purposes and to serve the public in its effort to eliminate housing discrimination, to resolve fair housing disputes, to find and to make available decent rental housing to persons regardless of race or color, and to assure rights to the important social, professional, business, economic, and political benefits of associations that arise from living in a community integrated with African Americans. The defendant's unlawful acts and practices have caused FHOM to suffer economic losses in staff pay, in funds expended in support of volunteer services, and in the inability to undertake other efforts to end unlawful housing practices. (ER 5.)

In response to the complaint, Mr. Combs filed a motion to dismiss on the ground that FHOM lacks standing. Relying on the language of FHOM's complaint and the *Havens Realty* decision, the district court denied Mr. Comb's motion to dismiss. (App. 18.)

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concerned that an adverse administrative decision was imminent, and they felt they would be in a better position to obtain a settlement if they filed a lawsuit. FHOM's Executive Director, Nancy Kenyon, admitted that they withdrew the complaint because their discussions with the agency "caused us to believe that they were not doing a good job investigating the complaint and had not made any progress in mediating a settlement." (ER 155.)

After a series of discovery motions, on the eve of trial the district court granted a motion for terminating sanctions against Mr. Combs based on alleged discovery abuses, and a default judgment and award of compensatory and punitive damages was made. (App. 29.)[3] In its application for the default judgment, FHOM claimed two kinds of damages: (1) *diversion of resources* "caused by the diversion of Fair Housing of Marin's resources away from its educational programs, counseling, and its other programs and activities to the investigation of defendant's housing practices" and (2) *frustration of mission*, or FHOM's non-economic interest in ensuring equal housing. FHOM asked for $16,317 for its alleged diversion of resources and $34,500 for its alleged frustration of mission.

FHOM calculated its alleged damages for diversion of resources by adding up all of its staff time and costs relating to Water Edge Apartments, including intake of complaints, testing, prosecution of the administrative action, and prosecution of this lawsuit. FHOM also claimed $3,240 for participating in local advocacy groups. The evidence supporting these damages was a written declaration from FHOM's Executive Director, Nancy Kenyon. Ms.

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[3] As part of the terminating sanction, Mr. Combs' answer was stricken, so far purposes of FHOM's motion for default judgment, the factual allegations regarding liability in FHOM's complaint were accepted by the district court as true. However, the district court correctly recognized that FHOM's allegations regarding damages were *not* to be taken as true (see *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977) (citing *Pope v. United States*, 323 U.S. 1, 12 (1944)), so the district court made particularized findings as to the nature and amount of FHOM's damages. (App. 34-38.)

Kenyon declared that it was her understanding FHOM's diversion of resources damages consist of "the harm caused by the diversion of Fair Housing of Marin's resources away from its other programs and activities to the investigation of defendant's housing practices . . . or the activities that [FHOM] had to forego to address defendant's actions." (ER 155-156.) There was no evidence that these resources were expended based on any real or threatened injury to FHOM itself.

Under the "frustration of mission" category, FHOM claimed anticipated future costs of $8,100 to "test and monitor the defendant's housing practices in the next three years." FHOM also claimed $26,400 for future "outreach" to counteract the effect of Mr. Combs' alleged discrimination. Again, the evidence supporting this claim was a declaration by FHOM's director, Ms. Kenyon. Ms. Kenyon's declaration in support of this claim is speculative. She stated that this "outreach" was necessary "to locate people who **may** have been affected by the defendant's discrimination and counsel them that discrimination, based on race is illegal." (ER 165 [emphasis added].) Again, there was no evidence that the outreach was intended to counteract the effect of the alleged discrimination on FHOM.

In its order entering default judgment, the District Court granted plaintiff all of its claimed "diversion of resources" damages, except the Court refused to allow FHOM to recover the cost of participating in the Marin Roundtable of Hate Violence (a reduction of $2,100). (App. 34-36.) Regarding the "frustration of mission" damages, the court granted FHOM $10,160 for future "outreach." (App. 36-38.) The Court refused to allow FHOM to recover the cost of future training, supervision, or monitoring,

because Mr. Combs had sold Waters Edge Apartments. (App. 37.) The court's award of compensatory damages totaled $24,377. The district court awarded $74,400 in punitive damages against Mr. Combs. (App. 38-40.) Later, FHOM was awarded attorneys fees at trial in excess of $500,000.

On appeal, in a decision of first impression in the Ninth Circuit, the Court of Appeals allied itself with the courts that have taken the most liberal interpretation of *Havens Realty*. Relying on the district court's findings, which the Court of Appeals found (without discussion) to be supported by the record, the Court held that "Fair Housing of Marin has direct standing to sue because it showed a drain on its resources from both a diversion of its resources and frustration of its mission." (App. 9.) The Court's opinion fails to address the fundamental issue of whether a fair housing organization's voluntary allocation or expenditure of its resources constitutes "injury in fact" for the purpose of standing in the absence of evidence of any other injury or impairment of the organization's activities. Mr. Combs requests that this Court now take up this issue.

## REASONS FOR ALLOWANCE OF THE WRIT

**There Is a Significant Conflict among the Circuits.** This petition should be granted because the Circuit Courts are divided as to whether a fair housing organization's voluntary decision to allocate or expend resources for investigation or litigation is sufficient to create standing *in the absence of any other evidence of injury or impairment of the organization's activities*. The split centers around

language from *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

This issue is significant and recurring. As a result of the split of authority, there is uncertainty in the law of organizational standing, and a great deal of resources by both litigants and the courts are being spent litigating this issue. This is detrimental to fair housing organizations, housing providers, and the public. An amicus brief submitted in this case by over 20 fair housing organizations in support of FHOM complains that housing providers have "converted the issue of fair housing organization standing into a cottage industry of satellite litigation within fair housing cases." Amici argued (and Mr. Combs agrees) that clarifying the standing issue will achieve judicial economy, reduce the cost of litigation for the parties, and serve the public interest by clarifying the expectations of parties, thus facilitating early resolution of these cases. Therefore Mr. Combs requests that the Court grant this petition.

### A. The Constitutional Minimum for Standing

The threshold question in every federal case is whether the court has the power to entertain the suit:

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. . . . As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.

*Warth v. Seldin*, 422 U.S. 490, 498-499 (1975).

The "irreducible constitutional minimum" for standing under Article III contains three elements: ***First***, the plaintiff must have suffered an "*injury in fact*," which the Court has defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotes and citations omitted). To be "particularized," an injury must affect the plaintiff "in a personal and individual way." *Id.* at 560 n.1. ***Second***, there must be a causal connection between the injury and the conduct complained of. In other words, the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (internal punctuation omitted). ***Third***, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 561. See also, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472-476 (1982) (discussing the purpose of the Constitutional minima for standing).

At each stage of the proceedings, the plaintiff is required to state facts and submit evidence commensurate with its burden of proving that it has standing.

> Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.

*Lujan v. Defenders of Wildlife*, 504 U.S. at 561 (internal citation omitted). See also, *Havens Realty*, 455 U.S. at 379 n.21.

This case involves both the injury in fact and the causation elements, because the injury claimed by FHOM is neither "injury in fact" nor was it caused by Mr. Combs.

### B. The Source of the Conflict – *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)

In *Havens Realty*, a non-profit corporation called Housing Opportunities Made Equal (HOME) and three individuals sued Havens Realty Corp., which owned and operated two apartment complexes in a suburb of Richmond, Virginia. The complaint alleged that Havens Realty engaged in the practice of illegally steering African American renters from an apartment complex predominantly occupied by whites to an adjoining complex that was integrated. *Id.* at 368 n.4. The complaint alleged that HOME had been injured because Havens Realty's racial steering "frustrated" HOME's efforts to assure equal access to housing through counseling and other referral services. HOME also alleged that it "had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." *Id.* at 379. Havens Realty filed a motion to dismiss the complaint on the ground that HOME lacked standing. The district court dismissed the complaint as to HOME on that ground. The Fifth Circuit Court of Appeals reversed, and the Supreme Court granted certiorari. HOME's standing was a key issue addressed by the Court.[4]

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[4] Initially, the Supreme Court held that Congress intended standing under Section 812 of the Fair Housing Act (42 U.S.C. §3612, now renumbered as §3613) to extend to the full limits of Article III of the Constitution. *Id.* at 372 (citing *Warth v. Seldin*, 422 U.S. at 501).

(Continued on following page)

Because the case was an appeal from a successful motion to dismiss, the Court was required to accept the allegations of the complaint as true, and broadly interpret the complaint in favor of the plaintiff. See *Warth v. Seldin*, 422 U.S. at 501. The Supreme Court thus accepted HOME's allegations "as broadly alleged," and concluded that HOME had standing *at that stage of the proceeding* based on HOME's broadly alleged "allegations of injury." *Havens Realty*, 455 U.S. at 379. The pertinent language from the decision deserves full quotation, because it has been the source of confusion among the lower courts:

> In the instant case, HOME's complaint contains the following claims of injury to the organization:
>
> > "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." [Citation to record omitted.]
>
> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's

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Thus, the courts lack authority to create "prudential barriers" to standing in suits under the Act.

> resources – constitutes far more than simply a setback to the organization's abstract social interests, see *Sierra Club v. Morton*, 405 U.S., at 739, 92 S.Ct., at 1368. We therefore conclude, as did the Court of Appeals, that in view of HOME's allegations of injury it was improper for the District Court to dismiss for lack of standing the claims of the organization in its own right.

*Havens Realty*, 455 U.S. at 379 (footnotes 20 and 21 omitted).

It is apparent from this language that the touchstone of the Court's analysis of standing is *injury* or *impairment* to the organization's activities as the result of defendant's conduct. In the quoted portion above and in footnotes 20 and 21 of its decision, the Court uses the terms "injury" and "impairment" no less than seven times. The Court never states that "diversion of resources" or "frustration of mission" necessarily gives rise to standing in the absence of any other impact on the organization's activity. [4] However, some courts have interpreted the decision to mean that a diversion of resources to investigate complaints or pursue litigation against a landlord, or frustration of mission resulting from the diversion, themselves constitute "injury in fact" sufficient to establish standing. (See section C, *infra*.)

Mr. Combs submits that the *Havens Realty* case does *not* hold that a diversion of resources alone necessarily

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[4] See *Association of Community Organizations v. Fowler*, 178 F.3d 350, 361 n.7 (5th Cir. 1999); *Fair Employ. Council v. BMC Marketing Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994); *Project Sentinel v. Evergreen Ridge Apartments*, 40 F.Supp.2d 1136, 1140 (N.D.Cal. 1999).

creates standing. The decision holds that the defendant's conduct must *impair* or *injure* the organization's activities. The Supreme Court quite clearly stated that if Havens Realty's steering practices impaired HOME's ability to provide counseling and referral services, then that impairment would be "injury in fact." *Havens Realty*, 455 U.S. at 379. Further, in footnote 21, the Court affirmed that *at trial*, the organization would have to demonstrate that it suffered "*impairment* to its role in facilitating open housing" before it would be entitled to judicial relief. *Id.* at 379 n.21 (emphasis added). While impairment of an organization's activities might constitute injury in fact, and diversion or allocation of resources might be a manifestation of that injury, the court did not hold that mere diversion or allocation of resources, without more, is itself injury in fact. This is the question that has bedeviled the lower courts ever since.

In this case, both the district court and the Court of Appeals relied on *Havens Realty* as support for their conclusion that FHOM has standing. (See App. 9, 34.) However, neither court considered whether Mr. Combs' alleged misconduct had an impact on FHOM's activities other than by FHOM's decision to direct some of its resources to investigation and litigation.

### C. The Circuits Are Divided as to Whether an Organization May Establish First Party Standing Solely by Its Voluntary Decision to Expend Resources to Investigate Complaints or Pursue Litigation

There is a sharp dispute among the Circuit Courts as to whether Article III standing can be created by an organization's own voluntary decisions to investigate

complaints or pursue litigation. This division has been recognized by both the Circuit Courts and by commentators. See, e.g., *Fair Employ. Council v. BMC Marketing Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994); *Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71, 79 n.6 (3rd Cir. 1998); *Cent. Ala. Fair Housing Center v. Lowder Realty*, 236 F.3d 629, 642 (11th Cir. 2000). See also, Dash T. Douglas, *Standing on Shaky Ground: Standing under the Fair Housing Act,* 34 Akron L. Rev. 613, 626-629 (2001); Michael E. Rosman, *Standing Alone: Standing Under The Fair Housing Act*, 60 Mo. L. Rev. 547, 593-596 (1995).

The D.C. Circuit has taken the strictest view of the proper basis for organizational standing under *Havens Realty*. In *Fair Employ. Council v. BMC Marketing Corp.*, 28 F.3d 1268 (D.C. Cir. 1994), a fair employment organization sued an employment agency (BMC) for failing to give referrals to black testers while white testers with comparable credentials received referrals. The Fair Employment Council alleged that BMC's discriminatory actions interfered with its efforts to promote enforcement of the civil rights laws, and required it to expend resources to counteract the defendant's alleged discrimination. *Id.* at p. 1276. The court rejected the Council's argument that diverting resources to testing constituted injury in fact that could be fairly traceable to the defendant's conduct.

> [W]e explicitly reject the Council's suggestion that the mere expense of testing BMC constitutes "injury in fact" fairly traceable to BMC's conduct. The diversion of resources to testing might well harm the Council's other programs, for money spent on testing is money that is not spent on other things. But this particular harm is self-inflicted; it results not from any actions taken by

> BMC, but rather from the Council's own budgetary choices. Indeed, it is not really a harm at all; assuming that BMC's actions did not have any *other* effect on the Council's programs independent of its efforts to increase legal pressure on possible open housing violators, the Council and its programs would have been totally uneffected if it had simply refrained from making the reallocation. One can hardly say that BMC has injured the Council merely because the Council has decided that its money would be better spent by testing BMC than by counseling or researching.

*Id.* at 1276-1277. See also, *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) ("An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation."); *National Treasury Employees Union v. U.S.*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) ("Frustration of an organization's objectives 'is the type of abstract concern that does not impart standing' "). Mr. Combs submits that the D.C. Circuit's interpretation of *Havens Realty* as set forth in the *BMC Marketing* case is legally correct in light of Constitutional doctrine on this issue.

The Third and the Fifth Circuits have taken a more middle ground approach. Both Circuits have issued opinions questioning the ability of an organization to bootstrap standing by its own actions. Those Circuits have held that litigation or legal counseling expenses without more are insufficient to confer standing, but devoting resources to counteract the defendant's alleged discrimination may be sufficient. In *Association for Retarded Citizens of Dallas v.*

*Dallas County Mental Health*, 19 F.3d 241 (5th Cir. 1994), an advocacy organization (aptly called "Advocacy, Inc.") brought suit under the Fair Housing Act against a neighborhood association and various county entities. The organization claimed that it suffered injury in fact because it had to direct some of its resources to challenging the defendants' allegedly wrongful actions. The Fifth Circuit disagreed:

> The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization. Advocacy, Inc.'s argument implies that any sincere plaintiff could bootstrap standing by expending its resources in response to actions of another. . . . Advocacy, Inc. and similar groups have no legally-protected interest in not expending their resources on behalf of individuals for whom they are advocates, at least where the only resources "lost" are the legal costs of the particular advocacy lawsuit.

*Id.* at 244. The court correctly recognized that there can be no injury unless and until a "legally-protected interest" of the plaintiff is violated. See *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) (the Article III judicial power exists "only to redress or otherwise to protect against injury *to the complaining party*") (citing *Warth v. Seldin*, 422 U.S. at 499).

Likewise, in *Association of Community Organizations v. Fowler*, 178 F.3d 350 (5th Cir. 1999) the Fifth Circuit held that devoting resources to litigation does not impart standing.

> An organization cannot obtain standing to sue in its own right as a result of self-inflicted injuries, i.e., those that are not "fairly traceable to the actions of the defendant". [Citation omitted.] Thus, it is immediately clear that ACORN's allegations of injury in fact due to resources it has expended bringing this . . . litigation fail to demonstrate ACORN's standing.

*Id.* at 358. The Court held that an organization's decision to spend its resources on litigation to counteract the effects of discrimination on a third party is entirely voluntary and therefore the causation element of the standing test is not satisfied. *Id.* at 358-359.

Although the Fifth Circuit has held that an organization may not bootstrap standing based on self-inflicted injuries, at least with respect to litigation expenses, it has also held that an organization that expends resources counteracting the adverse effects of discrimination may have standing. *Id.* at 360-361. See also *Louisiana ACORN Fair Housing v. LeBlanc,* 211 F.3d 298, 305 (5th Cir. 2000), *reh'g denied*, 224 F.3d 767, *cert. denied*, 532 U.S. 904 (2001). This distinction is not entirely clear in the Fifth Circuit's decisions, but it only makes sense if the organization is expending its resources to counteract the adverse effects of the discrimination *on the organization itself.* This was recognized by the D.C. Circuit in *Fair Employ. Council v. BMC Marketing*, 28 F.3d at 1277: "To be sure, the Court [in *Havens Realty*] did mention the 'drain on the organization's resources'. Yet this drain apparently sprang from the need to 'counteract' the defendant's assertedly illegal practices, and thus was simply another manifestation of the injury. . . ." See also, *National Treasury Employees Union v. U.S.*, 101 F.3d at 1429-1430 (mere conflict between an organization's goals and defendant's conduct

does not impart standing – the defendant's conduct must also make the organization's activities more difficult).

The Third Circuit has taken a similar approach. In *Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71 (3rd Cir. 1998), a fair housing organization (FHC) argued that it had standing because the defendants' alleged misconduct forced it to divert resources from counseling and other activities to (1) an educational campaign to counteract the discriminatory effect of defendants' advertisements, (2) an investigation into discrimination in advertising, and (3) litigation. The Court sided with the approach of the D.C. Circuit as set forth in the *Spann* and *BMC Marketing* (discussed above) and held that "pursuit of litigation alone cannot constitute an injury sufficient to establish standing under Article III." *Id.* at 79-80.

A more recent decision from the Third Circuit, *Alexander v. Riga*, 208 F.3d 419 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001) held albeit without much discussion that a fair housing organization that "stopped everything else" to devote attention to the lawsuit, and that diverted resources to investigate and counter discrimination, had standing, apparently because the discrimination impaired the organization's ability to carry out its mission. *Id.* at 427 n.4. The *Alexander* decision was decided by the same judge who authored *Fair Housing Council v. Montgomery Newspapers* two years earlier, but the *Alexander* decision does not reconcile or even reference that decision. The Third Circuit may be drawing a distinction between standing based on pre-litigation efforts to counteract discrimination and standing based on the litigation itself. Logically, the distinction does not hold water, since both of these "injuries" are self-directed unless taken to counteract

the effect of the discrimination *on the organization itself*, in which case they are both simply manifestations of the injury that those practices had inflicted upon the organization.

The Second, Sixth, Seventh and Ninth and Eleventh Circuits have taken the most liberal approach, and have concluded that an organization that voluntarily directs its resources toward investigating discriminatory conduct or pursuing litigation has established the necessary "injury in fact" to support standing. By and large, these decisions include no analysis of the issue presented here, and rely on short excerpts from *Havens Realty*. A typical example is *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990) which is frequently cited as support for the liberal approach. In that case, the Court states in a rather off-the-cuff manner that "*Havens* makes clear, however, that the only injury which need be shown to confer standing on a fair-housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination." *Id.* at 1526. See also, *Chicago v. Matchmaker Real Estate Sales Center*, 982 F.2d 1086, 1095 (7th Cir. 1992) (same); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993) (same); *Hooker v. Weathers,* 990 F.2d 913, 915 (6th Cir. 1993) ("FHCS devoted resources to investigating the defendants' practices and alleges that it has confirmed that defendants do discriminate on the basis of familial status. Therefore, FHCS has standing."); *Arkansas ACORN Fair Housing v. Greystone Development*, 160 F.3d 433, 434 (8th Cir. 1998) (" . . . the deflection of an organization's monetary and human resources from counseling or educational programs to legal efforts aimed at combating discrimination, such as monitoring and investigation, is itself sufficient to constitute

an actual injury. . . . "); *Cent. Ala. Fair Housing Center v. Lowder Realty*, 236 F.3d 629, 642 (11th Cir. 2000) ("Where a fair housing organization expends resources as a proximate result of the defendant's discriminatory conduct, and those resources would have been devoted to other activities consonant with its mission were it not for the offending conduct, it suffers injury . . . . ").

The *Lowder Realty* case is interesting because it does give the standing issue some considered analysis, although in the context of discrimination against testers. See *Lowder Realty*, 236 F.3d at 641-643. The court states:

> [W]e do not agree with the defendants that allowing the Center to seek damages, on this record, based on discrimination toward its testers is the equivalent of permitting the Center to "create its own injury." There is an obvious difference between the situation highlighted by defendants – where an organization manufactures the injury necessary to maintain a suit by expending resources on that very suit – and the situation where an organization incurs diversion of resources and frustration of purpose damages as a result of specific documented incidents of unlawful discrimination toward its testers. In the latter situation, the organization is clearly not seeking or inflicting its own injury; the injury is inflicted by the defendants.

*Id.* at 642. However, the court fails to acknowledge that an organization's decision to test an alleged discriminating landlord is just as voluntary as the decision to pursue litigation against the landlord. And, siding with the Second and Seventh Circuits, the court misconstrued *Havens Realty* as holding that "the identification and

combating of discrimination [i]s a 'concrete and demonstrable' injury, which could cause a drain on organization resources" and thereby gives rise to standing. *Id.*

The rule adopted by these decisions cannot be reconciled with the actual holding and analysis of *Havens Realty,* which is that standing requires some injury to the organization itself, which may be manifest through investigation or litigation. *Havens Realty* did not hold that the investigation or litigation of discrimination against a third party are *themselves* injury in fact without proof that the defendant's conduct directly impaired the organization's activities. Nor can these decisions be reconciled with the causation requirement. For if the investigation or litigation is self-directed by the organization in response to alleged discrimination against a third party that has no effect on the organization, it cannot meaningfully be said that the alleged discrimination was a cause of the organization's injury.

### D. This Issue is Recurring and of Great Practical Importance

This issue has fundamental significance to fair housing organizations, tenants and housing providers nationwide. The importance of this issue is reinforced by FHOM's amici in the Ninth Circuit. No less than 22 fair housing and civil rights advocacy organizations joined in a brief supporting FHOM's request for a broad interpretation of the Article III standing requirement. Those amici were headed by the National Fair Housing Alliance, a private non-profit corporation located in Washington, D.C. comprised of more than 90 private fair housing organizations throughout the United States.

These amici sought clarification of the application of *Havens Realty* in the Ninth Circuit, and acknowledged that this was an issue of first impression for that court. These amici expressed concern that unnecessary resources were being spent on litigating the standing issue: "Rather than focusing on the substantive merits of discrimination claims, housing providers have converted the issue of fair housing organization standing into a cottage industry of satellite ligation within fair housing cases." They told the court:

> Clarifying how the *Havens* decision should be applied in fair housing cases will achieve judicial economy by reducing the amount of time district courts spend on standing issues; will reduce the cost of litigating this issue for the parties; and also will serve the public interest by clarifying the expectations of parties to fair housing disputes, thereby facilitating out-of-court settlement.

FHOM's amici also pointed out in a footnote that clarification of *Havens Reality* is "particularly important . . . because the existence of standing is fundamental to the court's subject matter jurisdiction, is outcome-determinative if the ruling goes against the complainant, and may be revisited multiple times in any one case." Standing is, of course, a threshold question in every federal case so it comes up regularly, and is recurring. This issue has been litigated in numerous cases, which tends to show the law is unsettled and unclear.

Clarification of this issue is also important because fair housing organizations frequently act as watchdogs to further enforcement of the Fair Housing Act and the public interest in open housing. See *Trafficante v. Metropolitan*

*Life Ins. Co.,* 409 U.S. 205, 211 (1972). However, this salutatory purpose can only go so far with respect to standing. It is well established that Congress may not abrogate the minimum constitutional requirements of injury in fact, causation and redressability. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima: a plaintiff must always have suffered 'a distinct and palpable injury to himself' . . . ."). Thus, a fair housing organization cannot bring suit under the Act unless it has experienced actual injury in its own right, and it is important that these organizations know what the pleading and proof requirements are to establish standing.

Besides fair housing organizations, the United States also is interested in this dispute as shown by its amicus curiae brief in support of FHOM. That brief points out the United States has an interest in ensuring the availability of "private enforcement actions, consistent with the statute and the Constitution." Resolution of this split of authority is important for administrative law judges who conduct hearings under sections 3610 and 3612 of the Fair Housing Act. See Rosman, *Standing Alone: Standing Under The Fair Housing Act*, 60 Mo. L. Rev. at 594-595 and n.90. The split of authority also has implications for government agencies that administer programs at a national level. (Particularly HUD, which issues grants to fair housing organizations under the Fair Housing Act. See 42 U.S.C. 3616a.[5]) The agencies favor uniformity so

[5] Section 3616a permits the Secretary of Housing and Urban Development to make grants and enter into contracts with fair housing

(Continued on following page)

that similarly situated individuals are treated the same and because it simplifies administration of their programs. Not surprisingly the courts oppose agency non-acquiescence. See, e.g., *Rogers v. Chater*, 118 F.3d 600, 602 (8th Cir. 1997) (holding Commissioner of Social Security Administration's policy of non-acquiescence with circuit law to be "flagrantly unlawful").

This issue also affects housing providers. The California Apartment Association submitted an amicus brief in support of Mr. Combs. The nature of CAA's interest is to promote fairness in the rental of residential housing while also encouraging and ensuring the equitable enforcement of fair housing laws only by appropriate parties who have standing under Article III. In fact, landlord tenant relations are notoriously volatile. It is not uncommon for tenants to lodge complaints that have no merit, often for ulterior motives, such as if they are being evicted for non-payment of rent or other legitimate reasons (as were the complaining tenants here). Later, they are not willing to pursue any legal remedy. However, if the fair housing organization that receives the complaint then goes out and investigates, under the rule advocated by FHOM, the organization now has standing to sue, and the landlord is left facing a lawsuit by a party who has no real interest in the suit except as an advocate for social policy.

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organizations for investigation and enforcement activities, including "testing and other investigative activities" and "litigation." See section 3616a(b). This also begs the question, how can a fair housing organization claim "injury in fact" for spending grant money from HUD on these activities?

Finally, this issue has importance even beyond the fair housing arena, since it concerns the basic standing requirements of Article III. Notably, several of the amici who supported FHOM are not fair housing organizations, but civil rights organizations, including Protection & Advocacy Inc. and the Disability Rights Education Defense Fund.

### E. This Case Squarely Presents the Issue that has Divided the Circuit Courts

This issue is squarely presented by the facts of this case. FHOM asserts that it has standing because it directed resources to the investigation of Mr. Combs and subsequent prosecution of this lawsuit. FHOM also claims standing based on the need for "outreach" to counteract Mr. Combs' alleged discrimination. (This may be thought of as a future diversion of resources.) However, FHOM's proof shows that these actions were undertaken voluntarily by FHOM in response to complaints against Mr. Combs. There was no evidence of any actual injury or impairment to FHOM's activities besides FHOM's voluntary allocation of resources to these efforts. FHOM's activities were taken as the result of third party complaints, not as the result of any injury or threat of injury to FHOM itself. Hence, the basic question is presented – may FHOM, by its own voluntary actions, establish standing to sue Mr. Combs in the absence of any actual injury or impairment to FHOM as the result of the alleged misconduct.

### F. The Rule Adopted by the Ninth Circuit is Simply Wrong

The broad interpretation of *Havens Realty* adopted by the Ninth Circuit and others is erroneous because it would

enable fair housing organizations, or any other person or entity for that matter, to create standing of their own volition by simply deciding to investigate a housing provider. If this were the rule, then the exercise of federal jurisdiction would be "gratuitous and thus inconsistent with the Art. III limitation." *Gladstone Realtors v. Village of Bellwood,* 441 U.S. at 99 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). Indeed, such a rule would effectively abolish the standing requirement for fair housing organizations (and other advocacy organizations), contrary to Constitutional doctrine. See *Sierra Club v. Morton,* 405 U.S. 727, 739-740 n.16 (1972).

Furthermore, an organization's abstract concern about a social policy matter that may be affected by litigation fails to substitute for the concrete injury required under Article III. An organization should not be permitted to turn its abstract social concern into a concrete injury by the simple expedient of directing resources to the problem, else the Article III requirement has no meaning. See *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38-39 and n.16 (stressing importance of the plaintiff's personal stake in litigation). The D.C., Third and Fifth Circuits have explicitly recognized this problem and interpreted *Havens Realty* to account for it. The other Circuits have more or less ignored it, as did the district court and the Court of Appeal in this case.

The evidence here is that FHOM is funded with government grants and other money for the specific purpose of investigating, counseling and prosecuting discrimination. FHOM has no legally protected interest in not expending its resources for the very purposes those resources were intended. See *Lujan v. Defenders of Wildlife,* 504 U.S. at 560 (injury in fact is an invasion of a "legally protected

interest"); *Assoc. for Retarded Citizens v. Dallas County Mental Health*, 19 F.3d at 244. Thus, causation, the second element necessary for standing, is lacking here also.

FHOM did not present any evidence that its expenditures were necessary to counter the effects of Mr. Combs' alleged discrimination *on FHOM's work*. Nor was there any evidence establishing the need to counteract Mr. Combs' alleged discrimination on the public in general – the only evidence that FHOM presented regarding its alleged "outreach damages" was its Executive Director's speculative declaration that states outreach "may" be necessary to locate and counsel individuals who "may" have been affected by the alleged discrimination, or who "may" have formed the mistaken impression that discrimination is legal. (ER 163, 165.) There was no evidence whatsoever that Mr. Combs' alleged misconduct had any impact on "the Marin Housing Market."

FHOM also failed to submit any evidence of causation other than evidence that it investigated third party complaints about Mr. Combs. There was no evidence that Mr. Combs' alleged misconduct had any effect at all on FHOM. This is not surprising since Mr. Combs had one 18 unit apartment building in a county which had, according to FHOM's own analysis in 1994, a total of 37,433 rental units. Given this statistic, it is difficult to believe that Mr. Combs' alleged misconduct caused a concrete and particularized, and actual or imminent, invasion of a legally protected interest held by FHOM, and in fact FHOM submitted no evidence of such injury. Even Justice Brennan, in *Havens Realty*, recognized that it was "implausible" that discrimination within an single housing complex might give rise to a "distinct and palpable injury"

throughout a metropolitan area or county. See *Havens Realty*, 455 U.S. at 377.

## CONCLUSION

The Court should take up this matter to clarify whether a fair housing organization may create standing by voluntarily directing its resources to investigating or pursuing litigation against a housing provider, in the absence of any evidence that the housing provider's alleged conduct injured or impaired the organization's activities other than the direction of resources. This question is of fundamental importance to fair housing organizations, housing providers, government agencies, and the public. The time is ripe to address this issue, in this case, and resolve the split among the Circuit Courts.

Therefore, this petition ought to be GRANTED.

Respectfully submitted,

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

FAIR HOUSING OF MARIN, a California non-profit corporation,
*Plaintiff-Appellee*,

v.

JACK COMBS, d.b.a. Waters Edge Apartments,
*Defendant-Appellant*.

Nos. 00-15925
00-17040

D.C. No.
CV-97-1247-MJJ

OPINION

Appeal from the United States District Court for the Northern District of California Martin J. Jenkins, District Judge, Presiding

Argued and Submitted
October 19, 2001 – San Francisco, California

Filed April 9, 2002

Before: Paul H. Roney*, Procter Hug, Jr. and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Roney

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* The Honorable Paul H. Roney, Senior Circuit Judge for the Eleventh Circuit, sitting by designation.

## COUNSEL

Michael K. Johnson, Lewis, D'Amato, Brisbois & Bisgaard LLP, San Francisco, California, attorneys for the defendant-appellant.

Thomas V. Loran III, Kim Zeldin, San Francisco, California, attorneys for the plaintiff-appellee.

## OPINION

RONEY, Circuit Judge:

Plaintiff Fair Housing of Marin ("Fair Housing") brought action for illegal housing discrimination on the basis of race against Jack Combs, owner of the Waters Edge apartment complex in San Rafael, California. Fair Housing alleged that Combs violated the Fair Housing Act of 1968 (42 U.S.C. § 3604), the Civil Rights Act of 1866 (42 U.S.C. § 1982), the California Fair Employment and Housing Act (CAL. GOV'T CODE § 12955), and the California Unfair Business Practices Act (CAL. BUS. & PROF. CODE § 17200, *et seq.*). In his answer Combs claimed, *inter alia*, that Fair Housing lacked standing to sue. The district court (N.D.Cal., Jenkins, J.) found that Fair Housing had standing and later sanctioned Combs for discovery abuses by striking his answer and entering default judgment against him prior to trial. The district court awarded the plaintiff compensatory damages of $24,377 and punitive damages of $74,400, and adopted the magistrate judge's recommendation, made after a full hearing, of attorney's fees and costs in the amount of $508,606.78.

Combs appeals, claiming that the district court erred in the following ways: 1) finding that Fair Housing had

standing to sue; 2) imposing sanction against Combs with default judgment and damages; and 3) awarding attorney's fees of $508,606.78. We affirm.

Fair Housing of Marin is a non-profit community organization in San Rafael, California. Among its many activities to further its mission of promoting equal housing opportunities, Fair Housing investigates allegations of discrimination, conducts tests of housing facilities to determine whether equal opportunity in housing is provided, takes such steps as it deems necessary to assure equal opportunity in housing and to counteract and eliminate unlawful discriminatory housing practices, and provides outreach and education to the community regarding fair housing.

Jack Combs owned and managed the Waters Edge apartment complex which had eighteen (18) rental units. Fair Housing received complaints that Combs was racially discriminating against black tenants and black potential tenants. In response, Fair Housing conducted two sets of controlled tests where a black tester was shown a unit at Waters Edge followed by a white tester. The tests indicated that Combs discriminated against black applicants.

I. Whether Fair Housing Has Standing.

We review the district court's decision regarding standing *de novo*. *Harris v. Itzhaki,* 183 F.3d 1043, 1049 (9th Cir. 1999) (citing *San Pedro Hotel Co., Inc. v. City of L.A.,* 159 F.3d 470, 474-75 (9th Cir. 1998); and *Johns v. County of San Diego,* 114 F.3d 874, 876 (9th Cir. 1997)). Whether a community fair housing organization has standing to sue a private party for violations of the Fair

Housing Act is a question of first impression for this circuit.

Fair Housing claims first-party standing as an organization on the grounds of diversion of resources and frustration of mission.

The Supreme Court set out the standard for organizational first-party standing in *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982), holding that Congress intended standing under the Fair Housing Act to extend to the full limits of Article III. In *Havens*, a fair housing organization called Housing Opportunities Made Equal (HOME) and two of its employed testers brought an action against Havens Realty, the owner of an apartment complex. The plaintiffs alleged that Havens Realty engaged in racial steering in violation of § 3604(d) of the Fair Housing Act. Racial steering is the "practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups." *Havens,* 455 U.S. at 367 n.1. (citation omitted).

The Court found that HOME suffered an injury sufficient to confer standing. *Id.* at 379. HOME devoted significant resources to identifying and counteracting Havens Realty's discriminatory steering practices, and this diversion of resources frustrated the organization's counseling and referral services. The Court concluded that "[s]uch concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a

setback to the organization's abstract social interests." *Id.* at 379 (citing *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972)).

Combs cites three cases to support his claim that Fair Housing lacks standing, but these cases are distinguished from the one at bar, and the law of those circuits is not different from the law we apply here.

(1) *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers,* 141 F.3d 71 (3d Cir. 1998), an action against a newspaper alleging that the newspaper had published discriminatory advertisements, simply held that plaintiff Fair Housing Council failed to meet its burden of proving a causal link between the alleged wrongdoing and the injury and failed to substantiate any perceptible impairment to its mission. *Montgomery Newspapers,* 141 F.3d at 76-77. In a later case, the Third Circuit in *Alexander v. Riga,* 208 F.3d 419 (3d Cir. 2000), held that plaintiff Fair Housing of Pittsburgh, a fair housing organization, had standing because it "diverted resources to investigate and to counter [the defendants' discriminatory] conduct." *Alexander,* 208 F.3d at 427 n.4.

(2) In *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.,* 28 F.3d 1268 (D.C.Cir. 1994), a fair employment case, the D.C. Circuit rejected the argument that the "mere expense of testing" constitutes injury in fact fairly traceable to the discriminatory conduct. *BMC Marketing,* 28 F.3d at 1276. The fair housing law for the D.C. Circuit concerning standing had been established by *Spann v. Colonial Vill., Inc.,* 899 F.2d 24 (D.C. Cir. 1990), where then-Circuit Judge Ruth Bader Ginsburg held that

> [a]n organization cannot, of course, manufacture the injury necessary to maintain a suit from its

> expenditure of resources on that very suit. . . . Havens makes clear, however, that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action. See *Havens*, 455 U.S. at 379. . . . Plaintiffs crucially alleged that these [discriminatory] advertising practices "interfered with plaintiff [Fair Housing Council] and [Metropolitan Washington Planning & Housing Association's] efforts and programs intended to bring about equality of opportunity for minorities and others in housing" and required plaintiffs "to devote scarce resources to identify and counteract defendants' advertising practices" (citations omitted). . . . The organizations instead allege concrete drains on their time and resources. Expenditures to reach out to potential home buyers or renters who are steered away from housing opportunities by discriminatory advertising, or to monitor and to counteract on an ongoing basis public impressions created by defendants' use of print media, are sufficiently tangible to satisfy Article III's injury-in-fact requirement.

*Id.* at 27-29 (citations omitted).

(3) In *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Health Retardation Ctr. Bd. of Trs.*, 19 F.3d 241 (5th Cir. 1994), the Fifth Circuit held that

> [t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization. [Plaintiff's] argument

> implies that any sincere plaintiff could bootstrap standing by expending its resources in response to actions of another.

*Ass'n for Retarded Citizens,* 19 F.3d at 244. Since that case was decided, the Fifth Circuit has held that "an organization could have standing if it had proven a drain on its resources resulting from counteracting the effects of the defendant's actions." *La. ACORN Fair Hous. v. LeBlanc,* 211 F.3d 298, 305 (5th Cir. 2000).

Five other circuits which have addressed the question of organizational first-party standing in a fair housing context have held that the type of injuries alleged by Fair Housing satisfy standing requirements. *See Ragin v. Harry Macklowe Real Estate Co.,* 6 F.3d 898 (2d Cir. 1993) (fair housing organization had standing to sue real estate company for placing newspaper advertisements depicting white people only because the fair housing organization was forced to devote significant resources to identify and counteract the defendants' advertising practices and did so to the detriment of their efforts to obtain equal access to housing through counseling and other services); *Hooker v. Weathers,* 990 F.2d 913 (6th Cir. 1993) (fair housing organization established standing by devoting resources to investigating and confirming defendant's discriminatory practices); *Vill. of Bellwood v. Dwivedi,* 895 F.2d 1521 (7th Cir. 1990) (holding that fair housing organization had standing to sue real estate brokerage for violations of Fair Housing Act. "[T]he only injury which need be shown to confer standing on a fair-housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination."); *Ark. ACORN Fair Hous., Inc. v. Greystone Dev., Ltd. Co.,* 160 F.3d 433 (8th Cir. 1998) (acknowledging that "the deflection of an

organization's monetary and human resources from counseling or educational programs to legal efforts aimed at combating discrimination, such as monitoring and investigation, is itself sufficient to constitute an actual injury [where] traceable to some act of the defendant" (citations omitted) but finding that plaintiff did not show specific facts establishing distinct and palpable injuries fairly traceable to defendant's advertisements); and *Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co., Inc.*, 236 F.3d 629 (11th Cir. 2000) (fair housing organization has standing to recover in its own right for the diversion of its resources to combat the defendant's discrimination).

In this Circuit, an analogous case is *El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review,* 959 F.2d 742 (9th Cir. 1991). In *El Rescate*, individuals and a legal services organization, El Rescate, brought a class action against the Executive Office of Immigration Review, challenging its policy for failure to provide full translation of deportation and exclusion hearings. This Court, applying *Havens,* held that "[t]he allegation that the EOIR's policy frustrates these goals [of helping refugees obtain asylum and withhold deportation] and requires the organizations to expend resources in representing clients they otherwise would spend in other ways is enough to establish standing." *Id.* at 748 (citing *Havens,* 455 U.S. at 379).

Following the lead of the other circuits which have upheld organizational standing for fair housing groups, it is not necessary here to conflict with those cases which suggest that litigation expenses alone do not establish standing.

Plaintiff Fair Housing of Marin responded to citizen complaints against Combs, and alleged injury beyond litigation expenses. The district court stated that

> one of [Fair Housing's] activities in combating illegal housing discrimination is to provide "outreach and education to the community regarding fair housing." Complaint, ¶ 5. [Fair Housing] alleges that, as a result of defendant's discriminatory practices, it has "suffered injury to its ability to carry out its purposes . . . [and] economic losses in staff pay, in funds expended in support of volunteer services, and in the inability to undertake other efforts to end unlawful housing practices." *Id.* Thus, fairly construed, [Fair Housing] complains that defendant's discrimination against African Americans has caused it to suffer injury to its ability to provide outreach and education (i.e., counseling).

The record supports the district court's finding that Fair Housing's resources were diverted to investigating and other efforts to counteract Combs' discrimination above and beyond litigation. Fair Housing itemized its claim of $16,317 for diversion of resources, and the district court granted $14,217. With respect to frustration of mission, the district court found that Fair Housing suffered $10,160 in frustration of mission damages, namely for design, printing, and dissemination of literature aimed at redressing the impact Combs' discrimination had on the Marin housing market.

We hold that Fair Housing of Marin has direct standing to sue because it showed a drain on its resources from both a diversion of its resources and frustration of its mission.

II. Whether the District Court Properly Imposed Sanctions and Entered a Default Judgment Against Combs.

The trial court's decision to strike Combs' answer and enter a default judgment based on discovery violations is reviewed for abuse of discretion. *Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang,* 105 F.3d 521, 524 (9th Cir. 1997) (citing *Dahl v. City of Huntington Beach,* 84 F.3d 363, 367 (9th Cir. 1996)).

Pursuant to Federal Rule of Civil Procedure 37(b)(2)(C), a district court has the option of, *inter alia*, "rendering a judgment by default against the disobedient party." FED. R. CIV. P. 37(b)(2)(C). In the Ninth Circuit, sanctions are appropriate only in "extreme circumstances" and where the violation is "due to willfulness, bad faith, or fault of the party." *United States v. Kahaluu Constr. Co., Inc.,* 857 F.2d 600, 603 (9th Cir. 1988) (citations omitted). Disobedient conduct not shown to be outside the litigant's control meets this standard. *Hyde & Drath v. Baker,* 24 F.3d 1162, 1167 (9th Cir. 1994).

The record is clear and undisputed that Combs repeatedly flouted even his basic discovery obligations, often violating court orders. For example, Combs not only failed to produce documents as ordered, but also misrepresented to both counsel and to the district court that the documents did not exist. The documents were in Combs' one-bedroom apartment. The district court found that Combs' actions prejudiced Fair Housing by depriving it of any meaningful opportunity to follow up on the time-sensitive information or to incorporate it into litigation strategy. The district court considered lesser or alternative sanctions and found them inappropriate because Combs continued to violate court orders despite multiple warnings and a finding that monetary sanctions should be imposed.

Combs argues that the sanctions were inappropriately entered against him because he eventually produced the documents. The district court properly considered and rejected this argument, citing this Court's holding in *North Am. Watch Corp. v. Princess Ermine Jewels,* 786 F.2d 1447, 1451 (9th Cir. 1986), where we held that "[b]elated compliance with discovery orders does not preclude the imposition of sanctions. *Nat'l Hockey League v. Metro. Hockey Club, Inc.,* 427 U.S. 639, 643 (1976) (per curiam); *G-K Props. v. Redevelopment Agency of the City of San Jose,* 577 F.2d 645, 647-48 (9th Cir. 1978). Last-minute tender of documents does not cure the prejudice to opponents nor does it restore to other litigants on a crowded docket the opportunity to use the courts. *G-K Properties,* 577 F.2d at 647-48."

The district court's determination to sanction Combs by default was not an abuse of discretion or clear error of judgment.

With respect to the determination of liability and the default judgment itself, the general rule is that well-pled allegations in the complaint regarding liability are deemed true. *Geddes v. United Fin. Group,* 559 F.2d 557, 560 (9th Cir. 1977) (citing *Pope v. United States,* 323 U.S. 1 (1944)). The district court is not required to make detailed findings of fact. *Adriana Int'l Corp. v. Thoeren,* 913 F.2d 1406, 1414 (9th Cir. 1990).

There is ample evidence in the record that Combs violated the Fair Housing Act of 1968, the Civil Rights Act of 1866, the California Fair Employment and Housing Act, and the California Unfair Business Practices Act.

With respect to the amount of the judgment for damages, the district court did not commit clear error

because it made several specific findings of fact with respect to Fair Housing's actual damages. *Simeonoff v. Hiner,* 249 F.3d 883, 892-93 (9th Cir. 2001). The record fully supports the award of $14,217 in compensatory damages for diversion of resources and a total of $10,160 for frustration of mission damages. Fair Housing had requested $16,317 and $34,500, respectively.

III. Whether the District Court Properly Awarded Punitive Damages.

An award of punitive damages is subject to an abuse of discretion standard of review. *Pavon v. Swift Transp. Co.,* 192 F.3d 902, 909 (9th Cir. 1999). *See also EEOC v. Farmer Bros. Co.,* 31 F.3d 891, 903 (9th Cir. 1994).

The Supreme Court has held that punitive damages may be assessed under 42 U.S.C. § 1983 when a defendant's conduct is shown to be motivated by evil motive or intent, or if it involves reckless or callous indifference to the federally protected rights of others. *Smith v. Wade,* 461 U.S. 30, 56 (1983).

Fair Housing requested $200,000 in punitive damages, which it calculated to be one full year of gross revenues from Combs' Waters Edge property. The district court found that Combs acted with at least a reckless disregard for the federally protected rights of blacks who were either tenants or potential tenants and awarded punitive damages of $74,400. It arrived at that figure by relying on the stipulated facts in the record and focusing on Combs' behavior against two black tenants who were replaced by white tenants.

The court found that Combs generated ninety-three (93) months of "all-white" revenue from the two apartment units. The record reflects that Combs offered vacant apartments for $800-$825 per month during the time of his discrimination. The district court took the lower number ($800) and multiplied that by 93 months of Combs' "all-white" revenue for those two apartment units for a punitive damage award of $74,400. The district court made specific calculations when awarding punitive damages and carefully limited them to the present case, specifically noting that although it was "aware that other African-American tenants had previously been tenants at Waters Edge . . . the circumstances of their departures are not part of this record" and that "the punitive damages sum derived from the above calculation is sufficient and reasonable under the circumstances."

Combs does not challenge the methodology of the district court's punitive damages calculation. Rather, he challenges the sufficiency of the evidence. In this Circuit, a challenge to the sufficiency of the evidence to support a punitive damage award must be rejected if the award is supported by substantial evidence. *Lambert v. Ackerley,* 180 F.3d 997, 1012 (9th Cir. 1999) (en banc). We define substantial evidence as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Landes Const. Co., Inc. v. Royal Bank of Can.,* 833 F.2d 1365, 1371 (9th Cir. 1987) (citing *St. Elizabeth Community Hosp. v. Heckler,* 745 F.2d 587, 592 (9th Cir. 1984)).

Here, the district court did look to the full record before it and found that "the record on liability is damning, and Combs' conduct is punishable on its own merits"

while making sure that the court did not "make [Combs] a vehicle for redressing similar injuries he did not cause."

The full record indicates, among other things, that Combs 1) knew that it was illegal to discriminate on the basis of race; 2) treated Fair Housing's African-American testers less favorably than its white testers; 3) told a tester and other tenants that Combs wanted an all-white building; 4) used offensive and racially derogatory language when telling several tenants that he did not want to rent to African-Americans; 5) and told one tenant that he could use the pretext of bad credit to refuse to rent to African-Americans.

The full record shows that Combs' conduct met at least the reckless or callous indifference standard for punitive damages and is sufficient to satisfy and uphold the district court's punitive damages award.

IV. Whether the District Court Properly Awarded Attorney's Fees and Costs in the Amount of $508,606.78.

This Court must give deference to a district court's determination of reasonable attorney's fees, but the district court has to provide some indication or explanation as to how it arrived at the amount of fees awarded. *Chalmers v. City of L.A.*, 796 F.2d 1205, 1211 (9th Cir. 1986), *amended by* 808 F.2d 1373 (9th Cir. 1987).

Combs argues on appeal that the district court erroneously awarded attorney's fees to Fair Housing because Fair Housing achieved only limited success in its litigation against him. Without regard to the merits of this argument, however, Combs did not make this argument in the district court and it is therefore waived. *Natural Res. Def.*

*Council v. Houston,* 146 F.3d 1118, 1130-31 (9th Cir. 1998) (citing *Parks Sch. of Bus., Inc. v. Symington,* 51 F.3d 1480, 1487 n.4 (9th Cir. 1995) (holding that failure to raise issue before the district court constitutes a waiver of that issue)).

At first glance the amount of the attorney's fees awarded seems very high. It is more than five times the amount of the compensatory and punitive damage awards combined.

The Supreme Court, however, has rejected the notion that attorney's fees in civil rights cases should be proportionate to the amount of damages a plaintiff recovers. *City of Riverside v. Rivera,* 477 U.S. 561 (1986) (upholding attorney's fees award of $245,456.25 where compensatory and punitive damages were $13,300 from federal claims and $20,050 from state-law claims). *See also Missouri v. Jenkins,* 491 U.S. 274 (1989) (upholding attorney's fees of $4 million in school desegregation case); *Quesada v. Thomason,* 850 F.2d 537 (9th Cir. 1988) ("[t]he district court should not have reduced the attorney's fees simply because the damage award was small"); *Morales v. City of San Rafael,* 96 F.3d 359 (9th Cir. 1996) (vacating district court's award of attorney's fees because it was calculated improperly and too low; district court awarded only $20,000 in attorney's fees even though civil rights plaintiff had won compensatory damages of $17,500 and included "extensive and detailed explanations as to why the lodestar figure of $134,759.75 was a reasonable fee in this case").

The magistrate judge held a hearing with respect to attorney's fees and made careful findings and calculations in making the recommendation, which the district court

adopted in its entirety. With respect to the hourly billing rates, the magistrate judge found "ample evidence," including declarations by expert witnesses, that the hourly billing rates plaintiff's counsel requested were reasonable. The magistrate judge further noted that "[d]efendant's challenge . . . lacks substantial evidentiary support."

With respect to the actual number of hours spent, the magistrate judge began his analysis by noting that the documents submitted by plaintiff's counsel were "detailed, thorough, and apparently reliable." The magistrate judge also stated that plaintiff's counsel "exercised considerable billing judgment. . . . [T]hey reduced the number of hours by a substantial margin in order to adjust for any excessive, redundant, or unnecessary hours." The magistrate judge found that the number of hours plaintiff's counsel claimed were not excessive, given the "consistently high quality" of the plaintiff counsel's work and the circumstances involved. The magistrate judge stated that he

> identified no claims for discrete pretrial events or submissions with respect to which we are confident that the time devoted by counsel for plaintiff was obviously more than could reasonably be justified . . . [w]hen we began our consideration of[attorney's fees] we felt some concern about the number of hours claimed . . . [b]ut those concerns have evaporated as we have more closely examined the papers – and focused on their quality, the research that they evidence, and the detailed and fact specific work that was required to prepare them. While the hours claimed for this work are substantial, we cannot say, when we take all pertinent considerations into account, that the hours are excessive.

Because of this thorough analysis, reviewed under the standard of review required in such cases, Combs has not convinced this Court that the district court abused its discretion or committed clear error by adopting the magistrate judge's recommendations as to attorney's fees and costs.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FAIR HOUSING OF MARIN,

Plaintiff,

v.

JACK COMBS,

Defendant. /

No. C97-1247 MJJ

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

(Filed Mar. 10, 1998)

## INTRODUCTION

This is an action for housing discrimination. Plaintiff Fair Housing of Marin ("FHOM") seeks legal, equitable, and declaratory relief from defendant Jack Combs ("defendant"), the owner and operator of an apartment complex, for allegedly discriminating against African Americans based on their race or color in violation of (1) the Fair Housing Act of 1968; (2) the Civil Rights Act of 1866; (3) the California Fair Employment and Housing Act; and (4) the California Business & Professions Code. Pending before the court is defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.[1] The motion requires the Court to decide whether FHOM has standing to assert claims against defendant

[1] Defendant's motion is framed as a Fed. R. Civ. P. 12(b)(1) motion to dismiss. As such, the motion is technically untimely because defendant has already responded to the complaint. However, since the matter of subject matter jurisdiction may be raised at any time pursuant to Fed. R. Civ. P. 12(h)(3), defendant's arguments are properly before the Court. *Augustine v. United States*, 704 F.2d 1074, 1075 n.3 (9th Cir. 1983).

under the Fair Housing Act of 1968 and the Civil Rights Act of 1866. Having considered the papers submitted by the parties and the oral arguments of counsel, the Court DENIES the motion.

## BACKGROUND

FHOM is a nonprofit corporation organized under the laws of the State of California. Its purpose is to promote the "equal opportunity in renting, purchasing, financing and advertising of housing and [the] elimination of all forms of illegal housing discrimination." Complaint, ¶ 4. FHOM's activities include "(1) investigating allegations of discrimination; (2) conducting tests of housing facilities to determine whether equal opportunity in housing is provided; (3) taking such steps as it deems necessary to assure such equal opportunity and to counteract and eliminate discriminatory housing practices; and (4) providing outreach and education to the community regarding fair housing." *Id.* Defendant is the owner and operator of Waters Edge Apartments, an 18-unit complex located in San Rafael, California. *Id.*, ¶ 5.

In February 1994, FHOM began receiving complaints from tenants residing at Waters Edge Apartments that defendant was discriminating against African Americans. *Id.*, ¶ 6. FHOM responded to the complaints by conducting an "investigation using fair housing testers." *Id.*, ¶ 8. After concluding that defendant had "engaged in a pattern or practice of discrimination against African Americans on account of their race or color . . . for the purpose or with the effect of excluding African Americans from residing at Waters Edge Apartments," FHOM filed the instant

lawsuit on April 9, 1997. *Id.*, ¶ 19. The complaint alleges the following injuries to FHOM:

> By reason of the defendant's unlawful acts and practices, FHOM has suffered injury to its ability to carry out its purposes and to serve the public in its effort to eliminate housing discrimination, to resolve fair housing disputes, to find and to make available decent rental housing to persons regardless of race or color, and to assure rights to the important social, professional, business, economic, and political benefits of associations that arise from living in a community integrated with African Americans. The defendant's unlawful acts and practices have caused FHOM to suffer economic losses in staff pay, in funds expended in support of volunteer services, and in the inability to undertake other efforts to end unlawful housing practices.

*Id.*, ¶ 20.

Defendant argues that FHOM lacks organizational standing to litigate these claims.

## DISCUSSION

The jurisdiction of the federal courts is limited by Article III section 2 of the Constitution to deciding "Cases" and "Controversies." U.S. Const., Art. III, § 2; *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S. Ct. 1055, 1067 (1997). Standing to sue is an aspect of the case or controversy requirement. *Id.* It queries whether the plaintiff has "'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Arlington Heights v.*

*Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977) (emphasis omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). At an "irreducible minimum," Article III requires: (1) an injury in fact which is concrete and not conjectural; (2) a causal connection between the injury and defendant's conduct; and (3) a likelihood that the injury will be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The party invoking the Court's jurisdiction bears the burden of establishing standing. *Id.* at 561. "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* Thus, an attack on the pleadings such as the one brought by defendant herein, permits plaintiff to rest on "general factual allegations of injury resulting from the defendant's conduct" because, on a motion to dismiss, the court presumes that "'general allegations embrace those specific facts necessary to support the claim.'" *Id.* (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990).

In addition to these minimum "constitutional" requirements, the Supreme Court has identified three "prudential principles by which the judiciary seeks to avoid deciding questions of broad social impact where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). These "prudential considerations" have been described as follows. First,

plaintiff's claim must fall within the "zone of interests" to be protected by the statute or constitutional guarantee in question. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982) (quoting *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). Second, the claim must be for injury to plaintiff's own legal rights and interests, as opposed to the rights and interests of third parties. *Warth v. Selding*, 422 U.S. 490, 499 (1974). Lastly, the injury must be individualized or confined to a discrete group, meaning that the Court must "refrain[ ] from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian College*, 454 U.S. at 475 (quoting *Warth*, 422 U.S. at 499-500)).

These principles do not apply in all cases, however, as "Congress may, by legislation, expand standing to the full extent permitted by Article III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone, Realtors*, 441 U.S. at 100 (quoting *Warth*, 422 U.S. at 501). In no event, however, may Congress eliminate the constitutional *minima* of "injury in fact." *Id.* Plaintiff must always establish that he has suffered a "distinct and palpable injury" that is likely to be redressed by a favorable court decision. *Id.*

With this standard in mind, the Court now turns to the issue of FHOM's standing to assert its claims under the Fair Housing Act of 1968 and the Civil Rights Act of 1866.

### A. Standing under the Fair Housing Act

The United States Supreme Court has held that an organization dedicated to the promotion of fair housing has standing to litigate fair housing claims in its own right if it alleges that defendant's discriminatory acts caused injury to the organization's activities and a consequent drain on its resources. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). In *Havens*, a fair housing organization ("HOME") brought suit against a realtor and one of its employees for "racial steering" in violation of the Fair Housing Act. *Id.* at 366. The complaint alleged that the defendant's illegal practices had frustrated "its efforts to assist equal access to housing through counseling and other referral services [causing HOME] to devote significant resources to identify and counteract defendant's racial steering practices." *Id.* at 379. Similar to the allegations in this case, the plaintiff organization in *Havens* alleged that it had spent considerable time identifying and counteracting the defendant's unlawful practices by utilizing "testers" to determine whether the defendant was in fact discriminating against African Americans. *Id.* at 368. After recognizing that Congress had intended standing under the Fair Housing Act to extend to the full extent of the Constitution and thus, is not limited by prudential considerations, the Supreme Court concluded that the injuries complained of by HOME were sufficient to confer standing. Specifically, the Supreme Court stated:

> If, as broadly alleged, petitioner's steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities –

> with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interest, *see Sierra Club v. Morton*, 405 U.S., at 739.

*Id.*

In reaching this conclusion, the Supreme Court noted that although HOME would have to demonstrate at trial that it indeed was impaired in its ability to promote fair housing, it was error for the district court to dismiss HOME's complaint because its allegations were sufficient to establish the constitutional *minima* of injury in fact necessary to satisfy Article III requirements. *Id.*

FHOM has alleged such injury in this case. According to the complaint, one of FHOM's activities in combating illegal housing discrimination is to provide "outreach and education to the community regarding fair housing." Complaint, ¶ 5. FHOM alleges that, as a result of defendant's discriminatory practices, it has "suffered injury to its ability to carry out its purposes . . . [and] economic losses in staff pay, in funds expended in support of volunteer services, and in the inability to undertake other efforts to end unlawful housing practices." *Id.* Thus, fairly construed, FHOM complains that defendant's discrimination against African Americans has caused it to suffer injury to its ability to provide outreach and education (*i.e.*, counseling). As in *Havens*, if defendant's discriminatory housing practices have "perceptibly impaired" FHOM's efforts to provide counseling, there can be no question that it has suffered the requisite injury in fact to confer standing under the Fair Housing Act. *Havens*, 455 U.S. at 379.

Defendant, relying primarily on two unreported decisions from the Eastern District of Pennsylvania, has directed the court to a line of authority from other circuits which has limited the *Havens* decision to its facts and held that the diversion of an organization's resources to legal efforts is insufficient to confer standing under the Fair Housing Act. This authority suggests that *Havens* does not stand for the proposition that an injury which is purely self-referential satisfies Article III standing. For instance, in *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corporation*, 28 F.3d 1268 (D.C. Cir. 1994), the D.C. Circuit, after finding that the plaintiff had standing because it had alleged facts which sufficiently mirrored *Havens*, stated, in *dicta*, that it rejected the conclusion that standing exists if an agency has deflected time and money from counseling to legal efforts at combating discrimination. *Id.* at 1277. According to the D.C. Circuit:

> By this logic, the time and money that plaintiffs spend in bringing suit against a defendant would itself constitute a sufficient "injury in fact", a circular position that would effectively abolish the requirement altogether. **Indeed, an organization devoted exclusively to advancing more rigorous enforcement of selected laws could secure standing simply by showing that one alleged illegality had "deflected" it from pursuit of another contrary to such decisions as *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). *Havens* did not so hold.** The Court there did not base standing on the diversion of resources from one program to another, but rather on the alleged injury that the defendants' actions themselves had inflicted

> upon the organization's programs. To be sure, the Court did mention the "drain on the organization's resources". Yet this drain apparently sprang from the organization's need to "counteract" the defendants' assertedly illegal practices, and thus was simply another manifestation of the injury that those practices had inflicted upon "the organization's noneconomic interest in encouraging open housing", an interest that is quite intelligible apart from the allied efforts at increasing legal pressure on civil-rights violators (Citations omitted).

*Id.* at 1277 (emphasis added).

Notwithstanding this language, the Supreme Court's decision in *Havens* remains controlling and this Court declines defendant's invitation to depart from precedent.[2] Since FHOM has alleged that the discriminatory practices of the defendant have injured its ability to carry out its purpose, and since one of FHOM's functions is to provide outreach and education to the community regarding housing discrimination, the court finds that FHOM has alleged a sufficient injury in fact to satisfy Article III standing requirements. *Havens*, 455 U.S. at 379.

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[2] The Ninth Circuit has not addressed the issue of a fair housing organization's standing to sue under the Fair Housing Act.

### B. Standing under the Civil Rights Act of 1866

Unlike the Fair Housing Act of 1968, the issue of standing to sue under the Civil Rights Act of 1866[3] requires examination of both constitutional and prudential considerations. *Warth*, 422 U.S. at 499-501. However, since the Court has already concluded that FHOM has satisfied the standing requirements of Article III, the only issue remaining to be determined is whether FHOM is barred from asserting its civil rights claim by the prudential standing rules discussed earlier in this Order. *See* Discussion, at 4-5.

Although the Ninth Circuit has not addressed this precise issue, other circuit courts have permitted fair housing organizations such as FHOM to assert claims on its own behalf under the Civil Rights Act of 1866. *See, e.g., Cabrera v. Jakabovitz*, 24 F.3d 372, 379 (2d Cir.), *cert. denied*, 513 U.S. 876 (1994); *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1089, 1095 (7th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993). Moreover, the prudential limitations which generally require that a plaintiff assert his own rights and not those of third parties to the suit, are inapplicable here because FHOM has asserted an injury to itself resulting from defendant's alleged discriminatory practices. Thus, FHOM has standing to assert its claims under the Civil Rights Act of 1866.

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[3] Notably, section 1982 of the Civil Rights Act of 1866 does not specifically state who may sue to enforce the rights it establishes. 42 U.S.C. § 1982.

## CONCLUSION

For the foregoing reasons, defendant's motion to dismiss for lack of subject matter jurisdiction is DENIED. FHOM has standing to assert its claims under the Fair Housing Act of 1968 and the Civil Rights Act of 1866.

**IT IS SO ORDERED.**

Dated: March 10, 1998

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FAIR HOUSING OF MARIN, a California non-profit corporation,

Plaintiff,

v.

JACK COMBS, individually and doing business as WATERS EDGE APARTMENTS,

Defendants.

_____/

No. C 97-1247 MJJ

**ORDER ENTERING DEFAULT JUDGMENT AND AWARDING COMPENSATORY AND PUNITIVE DAMAGES TO PLAINTIFFS**

(Filed Mar. 29, 2000)

## INTRODUCTION

Before the Court is a motion for default judgment by plaintiff Fair Housing of Marin ("FHOM"), enabled by the Court's striking of defendants' answer by the Court's March 2, 1999 Order. Having considered the briefs, declarations and arguments of counsel, the Court hereby enters default judgment against defendants Jack Combs individually and doing business as Waters Edge Apartments (collectively "defendants"), and assesses compensatory damages in the amount of $24,377.00 and punitive damages in the amount of $74,400.00.

## FACTUAL BACKGROUND

Plaintiff Fair Housing of Marin is a non-profit community organization located in San Rafael, California. FHOM maintains several programs in furtherance of its stated mission of ensuring equal housing opportunity and

educating the community on the value of diversity. Its major outreach programs include educational programs for schools and groups on diversity and stereotyping, housing discrimination research, affordable housing advocacy, and fair housing counseling.

In February 1994, FHOM received a discrimination complaint from Fatima Muhammed, an African-American tenant at the Waters Edge Apartments, which was then owned and managed by Combs. Combs had served Muhammad with multiple written demands to leave Waters Edge, for reasons she believed to be solely racial. In September of that year, FHOM received a second complaint about Combs from a Caucasian tenant of Waters Edge, Scott Wilmore.

In response to these complaints, FHOM conducted two "paired tests" whereby two FHOM employees, one Caucasian, the other African-American, were sent to Waters Edge posing as prospective tenants. The first paired test was conducted in October 1994, the second in May 1995. FHOM has presented the testers' reports of those inspections as evidence of differential treatment based on race. In the first test, Combs told the Caucasian tester that Waters Edge was an all-white building, that Combs no longer rented to blacks, and that the tester would "fit in quite nicely." Fishback Decl., ¶ 20-21. Combs treated the African-American tester politely, but she was not similarly encouraged to apply. Radden Decl., ¶ 8.

In the second test, Combs again treated the African-American tester politely but did not encourage her application. Russell Decl., ¶ 8-10. The same day, Combs showed the Caucasian tester the same apartment and told her that if she took possession of the apartment immediately,

Combs would clean the apartment, do repairs and allow her to live rent-free for the remainder of the month. Zeldin Decl., Exh. E at P000065 (tester report form of Perry Grey).

On December 1995, FHOM received three more discrimination complaints from Waters Edge tenants, including one African-American tenant (Cindy Mitchell) who eventually left Waters Edge after being served with at least two eviction notices. After Mitchell left in January 1996, no African-Americans remained in the 18-unit complex, and none became tenants for the remainder of Combs' ownership of Waters Edge, a period of over three years.

In addition to the comments made to Fishback during his test, Combs also represented to several Caucasian tenants that he wished Waters Edge to be an all-white building. Nicholson Decl., ¶ 8 ("I want an all-white building"); Sangster Decl., ¶ 4 ("I'm proud to have a all-white building"); Tramblie Decl., ¶ 9 (Combs stated wish to own an all-white building).

Combs also told several tenants that he did not wish to rent to African-Americans. Urmy Decl., ¶ 7 ("I don't want any niggers in my building. I own it. I'll have who I want"); Tramblie Decl., ¶ 6 ("I'll sell the place before I rent to a nigger"); Sangster Decl ., ¶ 4 ("No niggers are allowed on the premises"); Low Decl., ¶ 5 (Combs related that he could refuse to rent to "pickaninnies" under the pretext that their credit is not good enough).

This action was filed in 1997. Over the course of discovery, Combs repeatedly ran afoul of the Court's discovery orders and of the Federal Rules of Civil Procedure governing discovery. On October 5, 1998, the Court

adopted in part Magistrate Judge Hamilton's Report and Recommendation recommending sanctions against defendant, awarding monetary sanctions for discovery abuses. The Court did not at that time adopt the recommendation that terminating sanctions be ordered, but warned Combs that "any subsequent failure to comply with discovery orders may result in sanctions."

On March 2, 1999, the Court ordered terminating sanctions against Combs pursuant to F.R.C.P.P. 37(b)(2)(C) in response to defendant's repeated and egregious abuses of civil discovery, and Combs' failure to heed the clear warning provided over a half-year earlier. In doing so, the Court followed the legal test for imposing such a severe sanction. After weighing all five factors outlined in *Malone v. U.S.P.S.*, 833 F.2d 128, 130 (9th Cir. 1987), the Court struck Combs' answer as a sanction, and ordered entry of a default against Combs. Default was entered against Combs on March 4, 1999, and the instant motion for default judgment followed.

## LEGAL ANALYSIS

### I. Liability

In entering default judgment, the Court must first undertake an inquiry as to what violations, if any, arise from the well-pled allegations of the complaint. The Court need not make detailed findings of fact in the event of a default judgment. *Adriana Int'l. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990). The general rule is that, upon entry

of a default, well-pled allegations in the complaint regarding liability are deemed true. *Geddes v. United Financial Corp.,* 559 F.2d 557, 560 (9th Cir. 1977).[1]

Combs does not dispute the general principles of law outlined above, but counsels the Court that unreasonable inferences should not be drawn from the complaint. Combs also generally bemoans what he characterizes as the circumstantial nature of FHOM's allegations regarding discrimination. The Court would only point out in response that while direct evidence of racial animus is relatively rare, it is amply present on this record. Moreover, this animus unfortunately maps directly onto the pattern of increasingly exclusive Caucasian occupancy at the Waters Edge apartment complex during Combs' ownership. Combs argues that the record lacks the type of information enabling traditional methods of circumstantial proof of discrimination, *e.g.* by proof of disparate impact. As the Supreme Court has found, this point is inapposite where, as here, there is direct evidence of racial discrimination. *Trans World Airlines v. Thurston,* 469 U.S. 111, 121 (1985).

Therefore, the Court's review of the complaint indicates that imposition of liability is proper on all counts. FHOM has pleaded facts which, when accepted as true establish a violation of (1) sections 3604(a), 3604(c) and 3617 of the California Fair Housing Act; (2) 42 U.S.C.1982; (3) the California Fair Employment and Housing Act; and (4) section 17203 of the California Business and Profes-

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[1] The Court must make particularized findings as to damages. *Adriana,* 913 F.2d at 1414. It does so, *infra.*

sions Code. The Court therefore turns to FHOM's requests for compensatory and punitive damages, and for injunctive relief.

## II. Damages

### A. Compensatory Damages

#### 1. Diversion of Resources

FHOM claims that the complaints it received regarding Combs caused it to divert time and resources from its planned education and counseling programs to embark on a prolonged investigation of the extent and nature of discrimination in Combs' housing practices. Damages are cognizable for harm caused by the diversion of resources away from these core FHOM programs to investigate the allegations against Combs. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 n.19 (1982). The Seventh Circuit has characterized diversion of resources damages as equivalent to the "opportunity costs" of pursuing the investigation of Combs' practices. *U.S. v. Balistrieri,* 981 F.2d 916, 933 (7th Cir. 1992).

FHOM claims a total of $16,317 in diversion of resources damages, which it quantifies in four broad categories: (1) the cost of FHOM worker time in investigating and litigating the Waters' Edge complaints ($12,179); (2) the expenses incurred by FHOM employees in testing ($237); (3) tester recruitment and training costs ($661); and (4) costs associated with the formation of and participation in the Marin County Board of Supervisors' Task Force on Housing Discrimination, and the Marin Roundtable on Hate Violence ($3,240). Defendant disputes the hourly rates utilized to calculate the costs of FHOM

employees' time, and with defendant's financial responsibility for the Task Force and Roundtable expenses.

On the question of hourly rates, FHOM presents rates that it claims are reflective of the value of services in the marketplace.[2] Combs counters that there is no basis for the hourly rates, as there is no evidence that FHOM has ever charged any party these rates. Alternatively, Combs urges the Court to calculate damages based on a *pro rata* basis.

The Court has reviewed the submissions and finds as follows. First, FHOM's proposed hourly rates are reasonable, and even modest for this market. Moreover, it is completely reasonable to charge an hourly rate that does not match the *pro rata* salary of the individual; to find otherwise would place into question the fees and costs associated with a litany of professionals (including attorneys) whose hourly rate and salary prorated to the hour bear only passing resemblance to one another. On this record, the remarkable fact in this case is that the *pro rata* and billing rates are so close. Moreover, the concept of opportunity cost to FHOM, which is recognized as the equivalent measure of diversion of resources damages, applies equally where resources are diverted to assist in litigation. For those reasons, the Court finds the "case costs" request of $12,179 to be recoverable in full as

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[2] The hourly rates claimed are as follows: $75 for Nancy Kenyon (Executive Director); $70 for Caroline Peattie and Jane Shandler (Senior Fair Housing Specialists); $45 for Alex Diefenbach (Associate Director); and $15 for Jeff Fishback, Perry Grey, Maketa Groves, Sean Sullivan, Ana Hilda Mosh, Eugenia Amador, and Rob Hodil (Fair Housing Counselors). Kenyon Decl., Exh. T.

diversion of resources damages. The Court also finds that the $898 requested in testing costs and tester training is equally appropriate and reasonable as a measure of diversion of resources damages. Finally, FHOM requests a total of $3,240 for the formation of and participation on committees and task forces, namely (1) the Marin County Board of Supervisors' Task Force on Housing Discrimination ($1,140) and (2) the Marin Roundtable on Hate Violence ($2,100). On this record, however, FHOM has failed to establish a sufficient nexus between Combs' admittedly reprehensible conduct and the equally reprehensible phenomenon of hate violence. FHOM's hate violence outreach program may be another salutary purpose of FHOM's mission, but it is not a result of Combs' conduct. Therefore, the Court will not assess damages for diversion of resources pertaining to the Roundtable, as Combs has not been shown to be, and as a matter of logic is not, the "but for" cause of these expenses. The Court accordingly awards FHOM a total of $14,217 in compensatory damages for diversion of resources.

**2. Frustration of Mission**

FHOM also claims that Combs' activities did harm to their organizational mission to "ensure equal housing opportunity and to educate the community on the value of diversity in our neighborhoods." FHOM argues that the true ripple effects of Combs' discrimination can only be known and cured by significant outreach. A fair housing organization may suffer redressable injury to its "non-economic interest in encouraging open housing", or frustration of mission. *Havens,* 455 U.S. at 368, n.20. To recover, a fair housing organization must establish that expenditures in education, counseling and/or outreach are

necessary to counterbalance the effects of a defendant's discriminatory practices. *See, e.g., Spann v. Colonial Village, Inc.*, 899 F.2d 24, 28-29 (D.C. Cir. 1990).

FHOM claims a total of $34,500 in frustration of mission damages. These break down as follows: (1) further testing and monitoring of Combs' activities for compliance with fair housing standards over the next three years ($8,100); and (2) advertising and outreach designed to remediate any effects Combs' acts may have had on the community, enabled by the creation of an outreach position at FHOM ($26,400). Accepting Combs' representations that he has exited the rental property management business, FHOM revised the testing and monitoring figures to $500, making the adjusted frustration of mission total $26,900.

The Court has reviewed the data supporting FHOM's claims for frustration of mission and reaches the following conclusions. First, FHOM cannot establish on this record any need for expenditures on training, supervising or monitoring Combs, as he has now exited the rental management market. The Court's refusal to grant compensatory damages to that end is, however, contingent upon Combs remaining out of the market, and the Court will order *infra* that Combs keep FHOM apprised of any change in his inactive status within the next five years, thus making monitoring a costless endeavor for FHOM. Second, Combs' past bad acts do not warrant the ongoing partial charge of a part-time outreach position to his account. The Court finds that the costs envisioned for the design, printing and dissemination of literature aimed at redressing the impact Combs' discrimination had on the Marin housing market is adequate to redress FHOM for the harm to its mission. Therefore, the Court finds that a

total of $10,160 in frustration of mission damages are appropriate.

### B. Punitive Damages

Punitive damages are appropriately assessed where defendant has been demonstrated to act with reckless disregard as to the rights of prospective and actual tenants. *Smith v. Wade,* 461 U.S. 30, 56 (1983). Punitive damages "serve the purpose 'of punishing the defendant, of teaching him not to do it again, and deterring others from following his example.'" *Id.* FHOM requests $200,000 – which it calculates to be one full year of gross revenues from the Waters Edge property. As support for such a sizeable award, FHOM cites to *Adriana, supra* ($2.5 million in punitive damages awarded in addition to $6 million in compensatory damages); *Action SA v. Marc Rich,* 951 F.2d 504, 508-9 ($500,000 in punitive damages, $1.7 million in compensatory damages); *Fountilla v. Carter,* 571 F.2d 487, 492 (9th Cir. 1978); *City of Chicago v. Matchmaker Real Estate Sales Center,* 982 F.2d 1086, 1099-1100 (7th Cir. 1992). FHOM also cites to several unreported district and state court cases where substantial punitive damages awards were made for race-based rental discrimination. *See, e.g., Broome v. Biondi,* No. 96 CIV 0805 (S.D.N.Y. Nov. 4, 1997) (punitive damages award of $467,000 not excessive for co-op's refusal to rent to African-American tenant). Combs contends that no punitive damages are appropriate, given failure of proof. Combs has also elected not to introduce evidence of his net worth, as is his prerogative. *Tri-Tron,* 525 F.2d 432, 438 (9th Cir. 1975). Nonetheless, Combs has submitted his tax records which ostensibly demonstrate that neither Waters Edge nor any of his other rental properties generated net

revenues in the calendar years 1993 through 1997 inclusive. Combs Decl., ¶ 8, Exh. A.

The Court looks to the full record before it for guidance on the most judicious application of its discretionary power. On the one hand, the record on liability is damning, and Combs' conduct is punishable on its own merits and in the greater interest of eradicating housing discrimination. On the other, the Court must be careful to punish Combs for his own conduct, and not make him a vehicle for redressing similar injuries he did not cause.

The Court finds the most reasonable means of squaring those two competing concerns is to focus on the behavior Combs is alleged to, and now is deemed to, have undertaken. Combs has represented to others that he wished to operate an all-white building. The departures of two specific African-American tenants, Fatima Muhammed and Cindy Mitchell, both of whom complained of unfair treatment to FHOM, allowed Combs to own and operate Waters Edge devoid of African-American tenants. Both left Waters Edge only after a series of verbal and formal demands from Combs to leave, for reasons that on this record can only be deemed pretextual. In other words, the dividend from Combs' plan to "whiten" Waters Edge is an ascertainable sum, in the form of rental revenues subsequently generated by Muhammad and Mitchell's units. The Court finds that those rental revenues generated from Muhammad and Mitchell's units post-departure provide a reasonable benchmark for punitive damages.

Accordingly, Combs is ordered to pay $74,400.00 in punitive damages.[3]

While the above sum is roughly three times that awarded FHOM in compensatory damages, it is less than FHOM requested ($200,000, or roughly one years' gross rental revenues from Waters Edge). The Court finds that the award bears a suitably close relationship to the actual discriminatory acts fueling this lawsuit (*i.e.* the wrongful exclusion of African-American tenants from Waters Edge), while staying within established constitutional norms when compared to the compensatory damages award. *See Pacific Mutual Life v. Haslip,* 499 U.S. 1, 23-24 (1991) (punitive damages award four times as large as compensatory award "does not cross the line into the area of constitutional impropriety").

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[3] The Court relies on stipulated facts in the record to reach its punitive damages figure. Muhammed occupied unit 4 in Waters Edge and vacated in February 1994. She was replaced by a Caucasian tenant, and Combs received a total of 57 months worth of rental revenue from the unit before selling the property in April 1999. Mitchell occupied unit 6, and vacated in January 1996. She was replaced by a Caucasian tenant, and Combs collected a total of 36 months' rental revenue from that unit before he sold Waters Edge. The record reflects that Combs offered vacant apartments in that time period for 800-825 dollars a month. Taking the lower of those two figures, the Court multiplies the estimated rent for units 4 and 6 ($800) by the number of months Combs generated "all-white" revenue from those units (collectively 93).

The Court is aware that other African-American tenants had previously been tenants at Waters Edge. However, the circumstances of their departures are not part of this record. In any event the Court believes the punitive damages sum derived from the above calculation is sufficient and reasonable under the circumstances.

### C. Injunctive Relief

In April 1999, Combs sold the waters Edge complex and has renounced any intent of ever again participating in residential real estate management. Combs now lives in Pacifica, where he currently rents a room out to a tenant. Combs argues that the prayer for injunctive relief is mooted by his withdrawal from the market. FHOM argues that there is no guarantee that Combs' withdrawal is permanent, and that injunctive relief is still appropriate. In the alternative, FHOM seeks a declaratory judgment that Combs has violated fair housing laws. The Court finds that injunctive relief is no longer proper on this record, but orders Combs to inform FHOM annually in writing of any of his ownership and/or management of any rental property. This order shall remain in effect for five (5) years from the date of this order, and any change in Combs' status may warrant reconsideration of the Court's denial of monitoring and counseling costs to FHOM as a measure of frustration of mission damages.

## CONCLUSION

For the reasons provided herein, the Court hereby enters default judgment in favor of FHOM, finding defendants liable for violations of the Fair Housing Act, 42 U.S.C.1982, the California Fair Employment and Housing Act, and the California Business and Professions Code. Defendants are hereby ordered to pay compensatory

damages in the amount of $24,377.00 and punitive damages in the amount of $74,400.00.

**IT IS SO ORDERED.**

Dated: 3/29/2000

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FAIR HOUSING OF MARIN, a California non-profit corporation,

Plaintiff,

v.

JACK COMBS, individually and doing business as WATERS EDGE APARTMENTS,

Defendants. /

No. C 97-1247 MJJ

**JUDGMENT**

(Filed Mar. 29, 2000)

On March 29, 2000, the Court granted plaintiff Fair Housing of Marin's application for default judgment in this action. Therefore, IT IS HEREBY ORDERED that judgment be entered against defendants for violations of 42 U.S.C. § 1982, sections 3604(a), 3604(c) and 3617 of the California Fair Housing Act, the California Fair Employment and Housing Act (FEHA), and section 17203 of the California Business and Professions Code.

Defendants are hereby ordered to pay compensatory damages in the amount of $24,377.00, and punitive damages in the amount of $74,400.00. Defendants are further ordered to provide plaintiff within thirty (30) days of the date of this order a written listing of any and all real estate that plaintiff owns, operates, and/or manages in this judicial district. Updated listings shall be provided annually, for five (5) years from the date of the initial listing. The Court will retain jurisdiction over this matter to ensure compliance with defendants' disclosure obliga-

tions under this order. The Clerk of the Court shall close the file.

**IT IS SO ORDERED.**

Dated: 3/29/00

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| FAIR HOUSING OF MARIN, a California non-profit corporation,<br>Plaintiff-Appellee,<br>v.<br>JACK COMBS, individually, dba Waters Edge Apartments,<br>Defendant-Appellant. | Nos. 00-15925 and 00-17040<br>D.C. No. CV-97-01247-MJJ<br>ORDER<br>(Filed Jun. 04, 2002) |

Before: RONEY,* HUG, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Thomas voted to deny the request for rehearing en banc and Judges Roney and Hug have so recommended.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and request for rehearing en banc are denied.

* Honorable Paul H. Roney, Senior United States Circuit Judge for the Eleventh Circuit, sitting by designation.

JUDGMENT

**COSTS TAXED**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 00-15925
CT/AG#: CV-97-01247-MJJ

FAIR HOUSING OF MARIN,
a California non-profit corporation

Plaintiff-Appellee

v.

JACK COMBS, individually,
dba Waters Edge Apartments

Defendant-Appellant

NO. 00-17040
CT/AG#: CV-97-01247-MJJ

FAIR HOUSING OF MARIN,
a California non-profit corporation

Plaintiff-Appellee

v.

JACK COMBS, individually,
dba Waters Edge Apartments

Defendant-Appellant

(Filed Jun. 17, 2002)

APPEAL FROM the United States District Court for the Northern District of California (San Francisco)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco)

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered April 9, 2002

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
JUN 12 2002
by: [Illegible]
Deputy Clerk

Supreme Court, U.S.
FILED
OCT 7 2002
CLERK

No. 02-332

In The

# Supreme Court of the United States

JACK COMBS,

*Petitioner,*

vs.

FAIR HOUSING OF MARIN,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## QUESTION PRESENTED

Whether the court of appeals' judgment merits review by this Court, given that the decision is consistent with this Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and with all post-*Havens* appellate decisions, which have uniformly upheld standing whenever a fair housing organization such as respondent is forced to devote resources to counteract the defendant's discrimination.

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## INTRODUCTION

This case is an action under the Fair Housing Act and related federal and state fair housing laws brought by respondent Fair Housing of Marin ("Fair Housing"), a non-profit community fair housing organization, against petitioner Jack Combs for illegal housing discrimination based on race. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), this Court held that a fair housing organization had standing when it "had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices." *Id.* at 379. Applying the standards for organizational standing in *Havens* and followed by the other courts of appeals, the courts below concluded that Fair Housing has standing because Combs' discrimination required it to devote resources to programs and activities to counteract the effects of Combs' discrimination *above and beyond investigation or litigation*.

Nothing in this case warrants review by this Court. The result in this case does not involve a conflict among the circuits nor is it contrary to any of the decisions of this Court. Fair Housing would have organizational standing under the test developed in each of the circuit courts of appeals, all of which agree (in accordance with *Havens*) that the need to expend resources to counteract the effects of a defendant's discrimination constitutes a sufficient injury to confer standing upon a fair housing organization.

Insofar as there is a conflict among the circuits on whether standing can be based on a diversion of resources to a pre-litigation investigation alone or to expenses associated with litigation alone, this case is not the vehicle

that will allow the Court to resolve such questions. Although the decision below addressed diversion of resources to an investigation, this ground was alternative to the ground on which there is no conflict: Fair Housing's efforts to counteract Combs' discrimination.

The petition thus has no merit. It actually represents – after five years of contentious litigation – a final attempt by Combs to avoid responsibility for the consequences of his discriminatory acts as a landlord and his repeated discovery abuses.

## STATEMENT OF THE CASE

Respondent Fair Housing brought this action for illegal housing discrimination based on race against petitioner Combs. Fair Housing is a non-profit community fair housing organization. It is engaged in several different activities to further its mission of promoting equal housing opportunities, including: education programs in the community regarding fair housing, training programs for real estate professionals, research regarding housing discrimination in the community, advocacy for affordable housing, and fair housing counseling. Beginning in 1994, Fair Housing received five complaints of race discrimination from tenants at Combs' apartment complex, Waters Edge. Fair Housing responded by conducting an investigation using fair housing testers, which verified that discrimination was occurring at Waters Edge. As a result of Combs' discrimination, Fair Housing also took other action to counteract Combs' discrimination by assisting in the formation of a County Supervisor's Task Force on Housing Discrimination. Fair Housing then filed an action against

Combs to enforce federal and state fair housing laws prohibiting discrimination based on race.

The testimonial and demographic evidence developed both before and after the filing of the lawsuit established that Combs engaged in intentional housing discrimination in violation of federal and state law by having, in his own words, "a white building." The district court found that Fair Housing had standing and later sanctioned Combs for discovery abuses by striking his answer and entering default judgment against him prior to trial. The district court subsequently awarded Fair Housing compensatory and punitive damages and attorneys' fees.

### A. Combs' Discriminatory Conduct

The evidence that Fair Housing adduced in support of its prove-up of the default judgment showed that Combs intentionally engaged in racial discrimination in housing against African-Americans.

In 1994, Fair Housing of Marin received two complaints of discrimination. Pet. App. at 30. The first was a complaint from an African-American tenant who alleged that Combs served her with multiple written demands to leave Waters Edge Apartments for reasons she believed to be solely racial. *Id.* The second complaint was from a white tenant of Waters Edge alleging that Combs was excluding African-Americans. *See id.*

In response to these two complaints, Fair Housing conducted two sets of controlled tests wherein an African-American tester was shown a unit at Waters Edge followed by a white tester. *Id.* In the tests, which were conducted in the fall of 1994 and the spring of 1995, Combs encouraged

the white testers to rent the apartment. *Id.* at 30-1. Combs described the complex to one white tester as a "white building" and stated that he had problems with African-American tenants in the past and no longer rented to them. *Id.* at 30. He told the other white tester that, if she moved in immediately, he would waive the rent for the remainder of the month. *Id.* He did not encourage the African-American testers to apply. *Id.* Testing also documented other disparate treatment between the African-American and white testers. Subsequently, in 1995, Fair Housing received three other complaints of racial discrimination at Waters Edge Apartments, including one from an African-American tenant who alleged that she was served with multiple eviction notices. *Id.* at 31.

Several tenant witnesses submitted sworn declarations testifying that Combs had told them he did not want to rent to African-Americans and that he wanted to have an "all-white building." For example, Combs told a tenant with managerial duties at Waters Edge that he wanted Waters Edge to be an all-white building. *See id.* On one occasion, Combs asked a prospective tenant if her husband and children were white. He told her that he did not like "niggers" and that there were no African-Americans in his building. Later, Combs told her: "I don't want niggers in my building. I own it. I'll have who I want." *Id.* at 31. Combs told yet another tenant that he hated the way the law works because it required him to rent to "nigger people." He said his way of getting around the law was that if the prospective tenants were African-American, he would tell them that their credit was not good. SER 767.

When Combs acquired Waters Edge in 1992, approximately 20% of the households in Waters Edge contained at least one African-American. SER 478. Two of the last

remaining African-American tenants believed that Combs evicted them because of their race. One declared that Combs did not like her African-American friends working on her car in the parking lot. Although white people worked on their cars in the Waters Edge parking lot, Combs told her she had to get out after he saw her African-American friends working on the car. SER 768-70.

At the time of entering into a rental agreement with another African-American tenant, Combs had not met her or her family and had no reason to know they were African-Americans. SER 764-5. The tenant declared that when Combs first met her, however, he said, "This is never going to work" and Combs eventually refused to renew her family's lease for reasons that she attributed to his racial prejudice. SER 765.

The racial composition of the tenants of Waters Edge reflected that Combs' statements to the white tester and white tenants were true: after renting to significant numbers of African-Americans in 1993, the number of African-Americans residing at Waters Edge dropped precipitously. In 1993, African-Americans resided at Waters Edge for a total of 41 months. SER 479. By 1996, an African-American resided at Waters Edge for only one month. *Id.* By 1997, no African-American tenants resided at the apartment complex. *Id.*

**B. Combs' Discovery Abuse**

The district court granted Fair Housing's motion to compel in early 1998 based on Combs' failure to respond to discovery requests seeking basic information and documents about tenants and prospective tenants of Waters Edge. ER 22 A-D. In response to the motion, Combs

represented to the court that certain categories of documents such as leases, applications, tenant rosters, and documents reflecting inquiries from prospective tenants did not exist. *Id.*

After the issuance of the court order, Combs continued to refuse to produce the information and documents ordered. The magistrate judge granted Fair Housing's motion requiring compliance with her prior order and warned that if Combs failed to comply with the order, she would recommend that a default be entered. ER 25.

After Combs failed to comply with the court's second order, the magistrate judge recommended that a default be entered, but the district court judge declined to enter a default and awarded monetary sanctions instead. Pet. App. at 32. The court nonetheless warned Combs that any further discovery abuse may result in the imposition of terminating sanctions. *Id.*

Believing, based on Combs' representations, that all documents had finally been produced, Fair Housing noticed the depositions of Combs and his wife. During the deposition, which occurred only a few weeks before the scheduled trial date, Fair Housing discovered that documents reflecting tenant inquiries, leases and tenant rosters did in fact exist, although Combs and his counsel had previously represented to the magistrate judge and Fair Housing that they did not. All of the documents were kept near Combs' desk in his one-bedroom home. ER 126.

The district court granted Fair Housing's motion for terminating sanctions, struck the answer, and entered a default against Combs. Pet. App. at 32. The district court ordered the terminating sanctions "in response to defendant's repeated and egregious abuses of civil discovery,

and Combs' failure to heed the clear warning provided over a half-year earlier." *Id.* After discussing the applicable legal principles, the court concluded that Combs' failure to produce documents met the "willfulness, bad faith, or fault of the party" requirement, that Fair Housing had suffered "inescapable prejudice as a result of Combs' gamesmanship" because important, time-sensitive documents had been produced shortly before trial which should have been produced more than a year earlier, and that no lesser or alternative sanction was appropriate. ER 126-9.

### C. Proceedings Below

At the outset of the case, Combs moved to dismiss Fair Housing's claims for lack of standing. The district court rejected the defendant's motion. The court held that the allegations of the complaint were no different from those alleged in *Havens*. The district court held that Fair Housing alleged that its ability to promote fair housing through counseling was impaired by the Combs' conduct and therefore Fair Housing alleged sufficient facts to support Article III standing. Pet. App. at 24.

After default was entered against Combs for his repeated discovery abuses, the district court held a hearing on Fair Housing's motion for default judgment and took evidence to establish the amount of damages. Combs did not contend that Fair Housing lacked standing in response to Fair Housing's motion for default judgment.

To support the allegations pled in the complaint, Fair Housing submitted affidavits of the testers and tenant witnesses and statistical information demonstrating the decreasing number of African-American tenants at Waters Edge Apartments. The court concluded that Combs had

engaged in intentional racial discrimination. The court stated that "while direct evidence of racial animus is relatively rare, it is amply present on this record." Pet. App. at 33.

The district court next awarded compensatory damages. The district court found that the complaints Fair Housing received about Combs' practices diverted its time and resources from "planned education and counseling programs," *see* Pet. App. at 34, and "Combs' activities did harm to [Fair Housing's] organizational mission to 'ensure equal housing opportunities and to educate the community on the value of diversity in our neighborhoods,'" *see* Pet. App. at 36.

The district court awarded damages to Fair Housing based on its efforts to counteract Combs' discrimination. The district court awarded damages for the diversion of resources from Fair Housing's planned education and outreach activities to the formation of, and participation in, a county supervisor's task force on housing discrimination. The planned activities and programs which Fair Housing was unable to complete included: (1) expanded adult education programs to community groups not yet reached by Fair Housing's outreach programs and activities; (2) outreach to government officials regarding fair housing laws and services provided by Fair Housing; (3) increased media outreach regarding fair housing laws and Fair Housing's services. SER 491-92. The damages were based on the staff time expended on the task force. Pet. App. at 34.

In awarding these damages, the district court specifically examined the causal connection between Combs' discriminatory practices and the need for remedial efforts

in the form of the supervisor's task force to counter that discrimination. Pet. App. at 36. The district court agreed with Fair Housing's claim that Combs' discrimination was one of the factors that caused it to recognize that there was a need for the formation of a supervisor's task force consisting of governmental and community organizations to combat the problem of housing discrimination in Marin County. *See* SER 491. The district court, however, excluded from its damage award the costs of activities the court did not believe resulted from Combs' conduct. Pet. App. at 36.

The district court also awarded damages for the costs of the design, printing and dissemination of literature aimed at counteracting the impact of Combs' discrimination on the housing market. Pet. App. at 37-8. The district court noted that "[a] fair housing organization may suffer redressable injury to its 'non-economic interest in encouraging open housing.'" *Id.* at 36, *citing Havens*, 455 U.S. at 379 n.20. The district court explained that to recover damages for harm to the interest in encouraging open housing, "a fair housing organization must establish that expenditures in education, counseling and/or outreach are necessary to counterbalance the effects of a defendant's discriminatory practices." Pet. App. at 36-7. The district court agreed with Fair Housing that Combs' activities caused harm to its mission of ensuring equal opportunity in housing that could be cured through significant outreach. Pet. App. at 36. The district court again closely examined the causal link between Combs' conduct and the need for remedial out-of-court efforts and awarded only those damages sufficient to redress the harm to Fair Housing's mission. Pet. App. at 37.

Finally, the district court awarded damages for the diversion of resources from Fair Housing's planned education and outreach activities to community groups, government officials and the media, SER 491-2, to a pre-litigation investigation of Combs' discrimination and staff efforts assisting the litigation of this action. Pet. App. at 34. The district court based its award of damages on the staff time expended in investigating Combs' discrimination and assisting with the litigation of this action, testing expenses, and tester recruitment and training costs. *Id.*

The Ninth Circuit affirmed the district court's decisions in their entirety. Pet. App. at 1. Judge Paul H. Roney, Senior Circuit Judge for the Eleventh Circuit sitting by designation, wrote the decision for a unanimous panel. The court explained that in *Havens* this Court held that a fair housing organization had standing where it devoted significant resources to identifying and counteracting discriminatory steering practices. Pet. App. at 4 (*citing Havens*, 455 U.S. at 379). Applying *Havens* and following the lead of the other circuit courts of appeals, the court held that "[t]he record supports the district court's findings that Fair Housing's resources were diverted to investigating and other efforts to counteract Combs' discrimination above and beyond litigation." Pet. App. at 9. The court also affirmed the finding that Fair Housing suffered damages which required efforts to counteract Combs' discrimination in the form of "the design, printing, and dissemination of literature aimed at redressing the impact Combs' discrimination had on the Marin housing market. *Id.*

Contrary to Combs' assertions, the court of appeals did not ally itself with "the circuits that have taken the most liberal interpretations of Havens Realty." Pet. at 9. In affirming the district court's decisions, the court of

appeals held that "*it is not necessary here to conflict with those cases which suggest that litigation expenses alone do not establish standing.*" Pet. App. at 8 (emphasis added). It held that the cases cited by Combs from the Third, District of Columbia, and Fifth Circuits for the proposition that Fair Housing lacked standing were distinguishable but explained that the "*law of those circuits is not different from the law we apply here.*" Pet. App. at 5 (emphasis added). The court followed "the lead of the other circuits which have upheld organizational standing for fair housing groups" and concluded that Fair Housing had standing. Pet. App. at 8.

## REASONS FOR DENYING THE WRIT

Combs contends that this case presents the question whether a fair housing organization may establish standing based on the diversion of resources to a pre-litigation investigation or to litigation. Pet. at i.

Combs mischaracterizes this case and the nature of the disagreement among the circuits. There is no "significant conflict among the circuits," Pet. at 9, about whether a fair housing organization has standing when it expends resources to counteract the effects of a defendant's discrimination. That issue was settled by this Court twenty years ago in *Havens*, 455 U.S. at 379. Following *Havens*, the federal courts of appeals uniformly agree that standing can be established by proof that a fair housing organization expended resources on out-of-court activities designed to remedy the effects of a defendant's illegal discrimination. In this case, the Ninth Circuit affirmed the determination that an outreach program was necessary to

counteract the effects of Combs' discrimination. Pet. App. at 9. The court also affirmed the findings that Fair Housing counteracted Combs' discrimination by expending resources on formation of, and participation in, a county-wide supervisor's task force on housing discrimination. *Id.*

Combs contends that the Third, Fifth and District of Columbia Circuits have questioned standing based on a diversion of resources to a pre-litigation investigation alone or expenses associated with litigation alone. However, these cases are inapposite here because these very same circuits have expressly held that a fair housing organization may have standing based on the need to devote resources to counteract a defendant's discrimination. Fair Housing thus has standing based on the independent ground that it needed to expend resources to counteract Combs' discrimination.

## I. THE CIRCUITS UNIFORMLY AGREE THAT STANDING EXISTS WHEN A FAIR HOUSING ORGANIZATION DEVOTES RESOURCES TO COUNTERACT DISCRIMINATION.

### A. Congress Contemplated Enforcement of the Fair Housing Act by Fair Housing Organizations.

The Fair Housing Act provides for enforcement through civil actions by "aggrieved persons." 42 U.S.C. § 3613(a) ("An aggrieved person may commence a civil action * * *."). It defines an "aggrieved person" as "any person who has been injured by a discriminatory housing practice." 42 U.S.C. § 3602(i)(1). The Act defines "person" to include "corporations," "associations," and "unincorporated organizations." 42 U.S.C. § 3602(d). The Act thus

provides for enforcement actions by organizations such as Fair Housing, a non-profit corporation. *See Alexander v. Riga*, 208 F.3d 419, 427 n.4 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001) (Fair housing organization was an "aggrieved person" under the Act.). In bringing such actions, fair housing organizations act as "private attorneys general in vindicating a policy Congress considered to be of the highest priority." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

### B. Standing Under the Fair Housing Act Is Established by a Showing of the Need to Counteract Discrimination.

In enacting the Fair Housing Act, Congress intended to define standing as broadly as permitted by Article III of the Constitution. *Id.* at 209. The sole requirement for standing under the Act "is Article III minima injury in fact: that the plaintiff allege that as a result of the defendant's actions he suffered a 'distinct and palpable injury.'" *Havens*, 455 U.S. at 372.

To establish standing under Article III of the Constitution, a plaintiff must show:

> (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Friends of the Earth v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 180-81 (2000).

This Court applied these principles in *Havens* to hold that a fair housing organization had standing. In *Havens*, the plaintiffs sued a realty company and one of its employees for steering African-American home seekers. The plaintiffs included a fair housing organization, Housing Opportunities Made Equal ("HOME"). HOME's mission was to make equal opportunity housing a reality. *Id.* at 368. Just as is true of Fair Housing, HOME's activities "included the operation of a housing counseling service and the investigation and referral of complaints concerning housing discrimination." *Id.* Similarly, just as occurred here, HOME had conducted testing of defendants' real estate practices and sued after the tests and other investigation revealed discriminatory conduct.

HOME's complaint alleged that it had been "frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services" and "had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices." *Id.* at 379. The Court concluded that if the allegations were true, there was no doubt that the organization suffered injury in fact:

> In determining whether HOME has standing under the Fair Housing Act, we conduct the same inquiry as in the case of an individual: Has the plaintiff "'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction."

*Id.* at 378-79 (citations omitted).

Under this test, standing clearly existed:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability

> to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such a concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interests.

*Id.* at 379.

The Court explained that standing may be based on an injury to an organization's mission. As the Court held, "[t]hat the alleged injury results from the organization's noneconomic interest in encouraging open housing does not affect the nature of the injury suffered, and accordingly does not deprive the organization of standing." *Id.* at 379 n.20 (citation omitted).

### C. The Court of Appeals' Judgment Should Be Affirmed Because the Default Established the Facts Alleged in the Complaint Supporting Fair Housing's Standing As True.

Fair Housing obtained a default against Combs for his repeated discovery abuses. Pet. App. at 32. The default entered against Combs prevented him from controverting the allegations of the complaint except those allegations going to the amount of damages. *Pope v. United States*, 323 U.S. 1, 12 (1944). At the hearing on Fair Housing's motion for default judgment, Combs did not contend that Fair Housing lacked standing or that it was required to adduce additional evidence in support of its standing allegations. *See* Pet. App. at 29.

In its complaint, Fair Housing alleged that one of its "activities in combating illegal housing discrimination is to provide 'outreach and education to the community regarding fair housing.'" Pet. App. at 9. Fair Housing also alleged that "as a result of defendant's discriminatory practices, it has suffered injury to its ability to carry out its purposes * * * and in the inability to undertake other efforts to end unlawful housing practices." *Id.*

These allegations mirror the allegations of the fair housing organization in *Havens*, which the Court found were sufficient to confer standing. In both cases, the fair housing organizations alleged that the defendant's discrimination injured their ability to conduct their programs and activities. Compare *Havens*, 455 U.S. at 379 ("Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services.") with Pet. App. at 9 ("[A]s a result of defendant's discriminatory practices, it has suffered injury to its ability to carry out its purposes * * *."). Similarly, in both cases, the fair housing organizations alleged that their resources were diverted from other activities and programs. Compare *Havens*, 455 U.S. at 379 ("Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices.") with Pet. App. at 9 ("[A]s a result of defendant's discriminatory practices, it has suffered injury * * * in the inability to undertake other efforts to end unlawful housing practices.").

Thus, to the extent that the facts supporting standing may be taken as true as a result of the default, the judgment below must be affirmed without regard to any split in the circuits. *Cf. Insurance Corp. of Ireland, Ltd. v.*

*Companie des Bauxites de Guinee*, 456 U.S. 694 (1982) (well-pleaded facts going to personal jurisdiction may be taken as true as a discovery sanction but distinguishing personal jurisdiction from subject matter jurisdiction).

### D. There Is No Circuit Conflict Regarding Whether a Fair Housing Organization May Establish Standing Based Upon Remedial Activities Necessary To Counteract A Defendants' Discrimination.

Even if Fair Housing's standing was not established by the default, certiorari is unwarranted. Combs contends that Fair Housing does not have standing because merely diverting or allocating resources, without more, is insufficient to establish injury in fact. Pet. at 15. To support his proposition, Combs cites cases from the Third, Fifth and District of Columbia Circuits but notes that other courts of appeals have held otherwise. Pet. at 16-20.

Combs mischaracterizes the nature of the conflict among the circuits and the nature of this case. The courts of appeals agree that the need to expend resources for out-of-court remedial activities to counteract a defendant's discrimination is sufficient to establish standing under *Havens*. As the Third Circuit has explained:

> In deciding organizational standing questions after *Havens*, appellate courts have generally agreed that where an organization alleges or is able to show – depending on the stage of the proceeding – that it has devoted additional resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement.

*Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 78 (3d Cir. 1998); *see Central Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co., Inc.*, 236 F.3d 629, 642 (11th Cir. 2001); *Arkansas ACORN Fair Housing v. Greystone Development, Ltd.*, 160 F.3d 433, 434 (8th Cir. 1998); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993); *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993) (Fair housing organization may establish standing by alleging "an injury arising from a 'purportedly illegal action [that] increases the resources the group must devote to programs independent of the suit challenging the action.'").

Combs concedes that out-of-court remedial activities necessary to counteract a defendant's discrimination are sufficient to establish standing even in circuits (the Third, Fifth and District of Columbia) that Combs cites as taking stricter views of organizational standing. Pet. at 16-20; *see Louisiana ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2001), *cert. denied*, 532 U.S. 904 (2001) ("[A]n organization could have standing if it had proven a drain on its resources resulting from counteracting the effects of the defendant's actions."); *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 78 ("[W]here an organization alleges or is able to show – depending on the stage of the proceeding – that it has devoted additional resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement."); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) ("*Havens* makes clear, however, that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action.").

Fair Housing's Article III standing in this case was determined precisely on the ground on which all the circuits agree. The Ninth Circuit held that Fair Housing had standing based on its out-of-court remedial efforts to counteract Combs' discrimination, which went beyond expenses associated with litigation. Pet. App. at 9. This determination by itself is sufficient for Fair Housing to establish standing under *Havens* in any of the circuits that have addressed the issue of organizational standing.

Combs argues that Fair Housing failed to demonstrate any harm to its mission or its activities from its efforts to counteract Combs' discrimination Pet. at 29. Combs also contends that Fair Housing's injuries were self-inflicted. Combs' assertions lacks merit.

Combs' contentions are highly fact bound and contradict the findings of the courts below. The court of appeals held that the record supported the determination that Fair Housing demonstrated an injury to its mission and its programs and activities caused by Combs that required it to expend resources to conduct an outreach campaign and form the supervisor's task force on housing discrimination. Pet. App. at 9, 34 and 36. In awarding damages, the district court agreed that "Combs' activities did harm to their organizational mission to 'ensure equal housing opportunity and to educate the community on the value of diversity in our neighborhoods.'" *Id.* at 36. The district court awarded damages to remedy this injury by awarding Fair Housing damages to cover the cost of the "design, printing and dissemination of literature aimed at redressing the impact Combs' discrimination had on the Marin housing market." *Id.* at 37. The goal of the outreach campaign was to locate people who may have been affected

by Combs' discrimination and provide them with counseling. SER 500. The district court rejected Combs' argument that there was no causal link between Combs' discriminatory practices and any impairment of Fair Housing's mission or any need for remedial efforts. *See* Pet. App. at 37.

The district court also awarded damages for the time and effort expended in founding and participating in the supervisor's task force on housing discrimination. The court of appeals affirmed the finding that the complaints Fair Housing received regarding Combs' discrimination caused a diversion of its resources away from planned education and counseling programs. Pet. App. at 9, 34.

The determinations of the courts below are consistent with established law developed by the courts of appeals. The courts of appeals have held – in accord with the express holding of *Havens* – that a fair housing organization suffers harm to its mission and its programs and activities sufficient to establish standing under Article III when it must devote increased resources to counteracting a defendant's discrimination. *Spann*, 899 F.2d at 27; *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 79.

The courts of appeals have explained that the need to counteract a defendant's discriminatory housing practices is a "manifestation of the injury that those practices had inflicted upon 'the organization's noneconomic interest in encouraging open housing' * * *." *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994), *quoting Havens*, 455 U.S. at 379 & n.20. The programs and activities to counteract a defendant's discrimination are necessary because the

defendant's illegal discrimination injured the organization's mission and its programs by increasing "the number of people in need of counseling," reducing "the effectiveness of any given level of outreach efforts" or generally making its "overall task more difficult." *Fair Employment Council of Greater Washington, Inc.*, 28 F.3d at 1276.

Injuries incurred from counteracting a defendant's discrimination are not voluntary, self-referential or self-inflicted. *See Spann*, 899 F.2d at 27 (drawing a distinction between an organization manufacturing injury by the expenditures of resources on the lawsuit and where illegal action requires an organization to increase the resources the group must devote to other programs); *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 79 (same). When a fair housing organization acts to counteract a defendant's discrimination, the organization does not inflict its own injury. *See Central Ala. Fair Hous. Ctr., Inc.*, 236 F.3d at 642. Instead, the injury is inflicted by the defendant because he engaged in discriminatory housing practices, *id.*, which the fair housing organization must counter to avert further harm to its mission.

Thus, there is no circuit conflict on the question whether a fair housing organization may establish standing based on the need to counteract a defendant's discrimination. The court of appeals held that Fair Housing had standing based on this independent ground. The availability of this well established, independent ground for decision weighs against review.

## II. This Case Does Not Raise the Issues of Whether A Fair Housing Organization May Establish Standing Based on a Diversion of Resources to A Pre-Litigation Investigation Alone or Expenses Association with Litigation Alone.

Combs contends that this case raises a question that he claims has split the circuits – whether a fair housing organization may establish standing based on a diversion of resources to a pre-litigation investigation *alone* or diversion of resources to expenses associated with litigation *alone*. Combs is incorrect.

Most of the circuits have permitted standing based on such injury. The Second, Third, Sixth, Seventh, Eighth and Eleventh Circuits permit standing based on a diversion of resources to an investigation of discriminatory practices. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) ("*Havens* makes clear * * * that the only injury that need be shown to confer standing on a fair-housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination. These are the opportunity costs of discrimination, since although counseling is not impaired directly there would be more of it were it not for the defendant's discrimination."); *Central Ala. Fair Hous. Ctr.*, 236 F.3d at 642 ("When a fair housing organization expends resources as a proximate result of the defendant's discriminatory conduct, and those resources would have been devoted to other activities consonant with its mission were it not for the offending conduct, it suffers injury * * *."); *Arkansas ACORN Fair Hous., Inc. v. Greystone Dev., Ltd.*, 160 F.3d 433, 434-5 (8th Cir. 1998) ("[T]he deflection of an organization's monetary and human

resources from counseling or educational programs to legal efforts aimed at combating discrimination, such as monitoring and investigation, is itself sufficient to constitute an actual injury * * *."); *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 78; *Ragin*, 6 F.3d at 905; *Hooker*, 990 F.2d at 915.

The Second, Seventh and Eighth Circuits also appear to permit standing based on the diversion of resources to expenses associated with litigation. *See Ragin*, 6 F.3d at 905; *Village of Bellwood*, 895 F.2d at 1526; *Arkansas ACORN Fair Hous., Inc.*, 160 F.3d at 434-35.

Combs relies upon cases from the Third, Fifth and District of Columbia Circuits as reaching a contrary result. In *Fair Employment Council of Greater Washington, Inc.*, 28 F.3d 1268, the D.C. Circuit rejected the argument that the "mere expense of testing" constitutes injury-in-fact sufficient to establish standing for an organizational plaintiff. *Id.* at 1276.

In *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Health Retardation Ctr. Board of Trustees*, 19 F.3d 241 (5th Cir. 1994), the Fifth Circuit held that "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impact standing on the organization." *Id.* at 244.

*Fair Hous. Council of Suburban Philadelphia* involved an action brought by a fair housing organization against a newspaper and other defendants alleging that the newspaper had published discriminatory advertisements. The fair housing organization had not received any complaints from the public about the advertisements and could not

establish that reviewing advertisements was a departure from its normal, everyday activities. 141 F.3d at 78. The Third Circuit therefore held that the fair housing organization had not established evidence of a causal connection between the defendants' alleged discriminatory advertisements and the diversion of resources to an investigation. *Id.* The Third Circuit expressly recognized that a fair housing organization could establish standing based on a diversion of resources to an investigation if it could establish such a causal connection. *Id.* The Third Circuit, however, rejected the notion that a fair housing organization could establish standing based on a diversion of resources to expenses associated with litigation alone. It held that "pursuit of litigation *alone* cannot constitute an injury sufficient to establish injury under Article III." *Id.* at 79-80 (emphasis added).

However, as Combs concedes, *see* Pet. at 17-20, these same circuits have expressly recognized that out-of-court remedial efforts to counteract a defendant's discrimination are sufficient to confer standing upon a fair housing organization. *Louisiana ACORN Fair Hous.*, 211 F.3d at 305; *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 78; *Fair Employment Council of Greater Washington, Inc.*, 28 F.3d at 1276; *Spann*, 899 F.2d at 27.

The courts below found standing based on this independent ground. This case thus does not involve a diversion of resources to a pre-litigation investigation alone or a diversion of resources to expenses associated with litigation alone. Instead, the courts below held that standing was established based on the very type of injury that *Havens* squarely held confers standing upon a fair housing organization – a fair housing organization's need to expend resources to counteract a defendant's discrimination. Pet.

App. at 9. The court of appeals therefore had no occasion to decide whether a diversion of resources to a pre-litigation investigation alone or a diversion of resources to expenses associated with litigation alone were sufficient to confer standing upon Fair Housing and there is no basis for granting certiorari in this case to decide those issues.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court U.S.
FILED
OCT 22 2002
OFFICE OF THE CLERK

No. 02-332

In The

# Supreme Court of the United States

JACK COMBS,

*Petitioner,*

v.

FAIR HOUSING OF MARIN,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## I. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

### A. Response To Discussion Re Alleged Discriminatory Conduct

Mr. Combs *strongly denies* FHOM's allegations that he discriminated against African-Americans in the operation of Waters Edge Apartments. It is undisputed that Mr. Combs rented apartments to at least ten separate African-American tenants during his ownership of the building (ER 140-44), that Mr. Combs also rented to at least nine different Hispanic, Asian and Filipino tenants (*id.*), and that the racial makeup of Waters Edge was not statistically different from the surrounding community.[1] (*Id.*) This matter was investigated by the California Department of Fair Employment and Housing, which found that "the African-American tester was not discriminated [against] during the application process." (See Petition, p.5, n.2.) The DFEH also found that "since no one was subject to any harm, complainant has no standing to file." (*Id.*)

None of the unfounded allegations in Respondent's Brief is included in FHOM's complaint. Nonetheless, consistent with FHOM's litigation tactics throughout this case, these untrue allegations are prominently included in Respondent's Brief for the obvious purpose of trying to bias this Court against Mr. Combs. Nonetheless, these arguments support Mr. Combs' Petition since the facts show that Mr. Combs' alleged misconduct had no impact on FHOM and did not cause "injury in fact" to FHOM as

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[1] According to 1990 census data, Marin County is about 85% Caucasian, 8% Hispanic, and 3.27% African-American. (SER 567.) At her deposition, FHOM's Executive Director estimated that the percentage of African-Americans in the community where Waters Edge Apartments is located is about "7% to 8%." (ER 267.) Based on the Stipulation of the Parties filed just prior to the trial date (ER 140-144), Mr. Combs rented to about 66 different tenants while he owned the building, and at least 17 of those tenancies (26%) and possibly more were African-American, Asian, Hispanic or Filipino.

required by *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

FHOM's witnesses are biased and the complaints are untrue. Each of the parties who complained against Mr. Combs is a former tenant who was properly evicted or given notice. Carla Urmy was evicted by Mr. Combs for legitimate reasons (Request for Judicial Notice ["RFJN"], para. 3, exh. C), and she filed an administrative housing discrimination complaint against Mr. Combs that was investigated and found to be without merit. (ASER 29, 45-48; RFJN, Para. 3, Exh. D.) Likewise, Fatima Muhammed and Cindy Mitchell, African-American tenants who complained to FHOM, were given 30 day notices to pay or quit for legitimate reasons, not because of their race. Ms. Muhammed was given notice because of repeated complaints from other tenants about noise from her and her family, failure to pay rent timely, and her security deposit check bounced. (ASER 10.) Ms. Mitchell was given notice because she and her family constantly disturbed the neighbors, by among other things, repeated loud altercations with each other. (ASER 12.)[2] Linda Sangster was evicted because she simply stopped paying her rent. (ASER 11.) Scott Wilmore is a disgruntled former tenant who was evicted for violating several material provisions

[2] Mr. Combs rented apartments to Ms. Mitchell and Ms. Muhammed knowing their race, which disproves FHOM's allegations of discrimination. FHOM argues that Mr. Combs did not know Ms. Mitchell's or her family's race and cites to her declaration as support for that statement. (Respondent's Brief, p. 5.) However, Ms. Mitchell's declaration does not say that, and Mr. Combs in fact knew her race because the Housing Authority told him this information before the unit was rented to her. Mr. Combs contends that he asked the Housing Authority about the rental history of the people who were planning to move in, and in response the Housing Authority provided information about her and her family, including her race. If these individuals were discriminated against, why did they not join this action as plaintiffs or at least pursue the available administrative remedies? If they had, FHOM would not have had to bring this suit in its own name and this standing argument would be unnecessary.

of the lease agreement, including playing loud music, parking in other tenants' spaces, letting his dog run loose, threatening another tenant, etc. (ASER 10-11.) In fact, Mr. Wilmore's apartment was rented to an African-American tenant immediately after he was evicted. (ER 141.)

Likewise, the "tests" conducted by FHOM are flawed because the tests were not "controlled matched pairs," and because Mr. Combs did not in fact refuse to rent to the African-American testers. The October 1994 test was done by Vikki Radden, an African-American woman, and Jeff Fishback, a Caucasian male. Ms. Radden did not complete the test. Ms. Radden was given an application by Mr. Combs and on a follow up visit was told the apartment was still available and that it would be "fine" for her to drop off the application in a few days. (ASER 55.) However, Ms. Radden revealed, "Due to my work schedule, I wasn't able to submit the application to Waters Edge Apartments." (SER 774-775.) Instead, another individual, Maketa Groves, pretended to be Radden's sister, and delivered the completed application ten days later. (SER 984-985.) However, rather than giving it to Mr. Combs or the manager, Ms. Groves just left the application with a grandmother who was babysitting her daughter's children in one of the apartments. (SER 985, 991.) Two days later, Ms. Groves called and spoke with Mr. Combs' wife to follow up. Ms. Groves noted that "on both occasions of phone contact [Mrs. Combs] was personable, cheerful sounding, and pleasant." (SER 991.) Ms. Radden's report states that the landlord answered her questions "openly" when she was shown the apartment. (SER 781.) Despite the irregularities in returning the application, there is *no* evidence that Mr. Combs refused to rent an apartment to Ms. Radden. (ASER 128, 156.)

With regard to the second test, the record shows that the African-American tester (Korissa Russell) was treated politely and the same as the Caucasian tester. For example, Ms. Russell was by told Mr. Combs' father in response to her question that units were available, and she was shown an available apartment. (ASER 92-93.) She was

also told the building and the surrounding neighborhood were quiet, and that although the neighborhood got a lot of bad press, "it's a good neighborhood." (ASER 92.) Moreover, both of the testers had bad credit and neither Ms. Russell nor the Caucasion tester Perry Grey was offered an apartment because they had bad credit. (ASER 70-88, 90-105.) In both sets of tests there was a notable lack of follow-through by the African-American testers. Moreover, Mr. Combs rented an apartment to an African-American tenant (Cindy Mitchell) less than 2 months after FHOM's tester Mr. Fishback visited the apartments. (ER 141.) This disproves Mr. Fishback's false declaration against Mr. Combs. (For a more complete response to FHOM's allegations of discrimination, see ASER 10-16.)

### B. Response To Allegations Regarding Procedural History

Just as there was no discrimination, there also was no discovery abuse. Like FHOM's unfounded allegations regarding the alleged discrimination, FHOM's assertions regarding Mr. Combs' alleged discovery abuse are irrelevant to the issues raised by this Petition and are apparently an attempt to bias this Court against Mr. Combs. The record shows that the terminating sanction was unjustified and grossly unfair since it deprived Mr. Combs of the opportunity to respond to the false allegations that he discriminated against African-Americans in the operation of Waters Edge Apartments.

It is vitally important for this Court to understand that the series of discovery orders issued by the district court against Mr. Combs were based on misrepresentations by Mr. Combs' prior *attorneys*, Patrick J. Manshardt and Mark V. Santa Romana, not by Mr. Combs or his wife. Mr. Combs and his wife were never told by their prior attorneys about motions, warnings, and court orders dated May 27, 1998, May 29, 1998, July 9, 1998, July 20, 1998,

July 24, 1998, July 31, 1998 and October 5, 1998, and FHOM has never raised any evidence to the contrary.[3]

Further, Mr. Combs did not refuse to produce documents and did not wilfully violate any orders by the district court. The record shows that Mr. Combs' prior attorneys failed to tell him or his wife of the court's warnings and orders, and those attorneys admitted in sworn declarations that *they were at fault* for not complying with the court's orders because they had a backlog of work resulting from three trials and an injury to one of them. (ER 31-32, 43-44, 46-47 and 51.) Further, it is not disputed that, at his deposition, Mr. Combs told FHOM's attorneys that there might be additional documents, and those documents were promptly produced to FHOM. (Respondent's Brief, p.6.) This shows that there was no willful failure to comply and that the orders against Mr. Combs were due to the fault of his former attorneys.

## II. REPLY TO RESPONDENT'S REASONS FOR DENYING WRIT

### A. Only Persons Who Suffer "Injury" May Enforce The Fair Housing Act

The Fair Housing Act defines an "aggrieved person" as a person "who has been *injured* by a discriminatory housing practice." 42 U.S.C. section 3602(i)(1) (emphasis added). This is consistent with *Havens Realty* and other decisions

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[3] FHOM's brief in the Ninth Circuit included the following citations to misrepresentations by Mr. Combs' *former attorneys*: ER22C [lawyers represented to the district court that Combs does not maintain any records of applicants], SER168-177 [correspondence from FHOM's attorney to Combs' attorneys regarding production of documents and information], ER37 and ER33 at line 3 [declaration by Mark V. Santa Romana that "defendant has now fully complied with Magistrate Judge Hamilton's March 19, 1998 order"], SER 2, 49-50 [representations by Patrick Manshardt that all documents ordered to be produced had been produced]. There is no citation to any such representation by Mr. Combs or his wife, and in fact there was none.

that require "injury in fact" as the basis for standing to sue under the act.

### B. FHOM Was Required To Prove "Injury" In Its Motion For Default Judgment – It Could Not Just Rely On The Allegations In The Complaint

The allegations of FHOM's complaint alone were not sufficient to establish standing at the stage of the proceedings when judgment was entered against Mr. Combs. FHOM was required to state facts and submit evidence commensurate with its burden of proof at the time judgment was entered. *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 561 (1992); *Havens Realty*, 455 U.S. at 379, n.21. When the district court considered FHOM's motion for default judgment, it accepted the factual allegations in FHOM's complaint regarding *liability* as true, but it was required to make particularized findings as to the nature and amount of FHOM's damages. See *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977). Therefore, at that stage of the proceedings, the nature and extent of FHOM's injuries (standing) was required to be proved by admissible evidence.

*Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694 (1982) is not to the contrary. In that case, the Court held that personal jurisdiction is an individual right which can be waived by misconduct, such as failing to comply with discovery. *Id.* at 703. However, the Court distinguished subject matter jurisdiction, which is a requirement under Article III and cannot be conferred by agreement or action of the parties. Therefore, the Court may not assume standing exists as a discovery sanction. *Id.* at 702.

### C. Havens Realty Does Not Hold That Expenditure Of Resources To Investigate Or Prosecute Discrimination Alone Is Sufficient To Impart Standing

FHOM's discussion of this issue highlights the confusion engendered in the Circuit Courts as a result of *Havens*

*Realty*. The confusion turns on the nature of the "injury" that is necessary to confer standing on a fair housing organization. Under *Havens Realty*, the injury must be *to the organization's activities*. The expenditure of resources to mitigate such an injury is a manifestation of the injury and will support standing. *Havens Realty* does *not* hold that the mere expenditure of resources to counteract discrimination will support standing without some other real injury to the organization. If a fair housing organization is permitted to bootstrap standing, then the Article III requirement of "injury in fact" is rendered meaningless.

The cases cited in Respondent's Brief make sense only if the organization is expending its resources to counteract the effects of the discrimination *on the organization itself*. None of the decisions cited by FHOM hold that standing may be conferred when an organization expends its resources to counteract the adverse effects of discrimination *on someone else*. In *Havens Realty*, plaintiff HOME's complaint alleged that the defendants' racial steering practices frustrated HOME's "efforts to assist equal access to housing through *counseling and other referral services*." *Havens Realty*, 455 U.S. 379 (emphasis added). In other words, assuming the complaint's allegations to be true, the defendants' racial steering practices interfered with HOME's own counseling and referral work. In response, HOME allegedly devoted resources to identify and counteract the defendants' misconduct, and this was a consequential injury resulting from the actual injury to the organization's activities.

In contrast, here, FHOM's evidence established only that it expended resources in response to complaints made to it by third parties, all untrue, by tenants who had been evicted or given notice. There is no evidence and, indeed, *no claim* that FHOM expended resources investigating and prosecuting Mr. Combs for the purpose of counteracting injury to FHOM's own activities. FHOM's expenditure of resources was self-directed, whereas the injury alleged by HOME, namely the interference with HOME's counseling and referral services, was not. So under these facts, FHOM did not experience injury in fact and, moreover, the causation element for standing is not satisfied.

FHOM's discussion of the *Havens Realty* case (Respondent's Brief, pp. 14-15.) is not illuminating because FHOM does not discuss the nature of the injury that is necessary to confer standing, which is the focus of this Petition. FHOM incorrectly argues that standing is established simply by "a showing of the need to counteract discrimination." *Havens Realty* makes no such pronouncement. On the contrary, *Havens Realty* requires a "concrete and demonstrable injury to the organization's activities." *Havens Realty,* 455 U.S. at 379. If there is a need to counteract the defendant's activities, it must stem from an actual or threatened injury to the organization.

### D. There Is A Conflict Among The Circuit Courts As To Whether The Expenditure Of Resources Without Other Injury Is Sufficient To Impart Standing

FHOM's argument ignores the authorities that expressly recognize this conflict. For example, in the *BMC Marketing* case, the D.C. Circuit expressly disagreed with the Seventh Circuit's holding in *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990). See *Fair Employ. Council v. BMC Marketing Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994). Also, the Eleventh Circuit has specifically allied itself with the Seventh and Second Circuits and rejected the D.C. Circuit's holding in *BMC Marketing*. See *Central Ala. Fair Hous. Ctr. v. Lowder Realty Co.*, 236 F.3d 629, 642 (11th Cir. 2000). So, contrary to FHOM's assertion, the Courts and commentators recognize the split. (See Petition, pp. 15-16.)

If some of the Circuits have adopted a broad test that allows standing based on an organization's voluntary allocation of resources to investigation or litigation, then Mr. Combs submits those Courts have misinterpreted *Havens Realty* and adopted a rule that is contrary to fundamental Constitutional doctrine. Standing cannot be manufactured by a litigant who pleads and proves only self-directed use of resources. Otherwise, both the "injury in

fact" and causation elements of the test for standing are rendered meaningless.

FHOM's discussion confuses rather than clarifies the issue. It is not helpful to talk about an unspecified "need" to counteract a defendant's discrimination. "Injury in fact" is not defined as involving any "need."[4] A more accurate question might be: is the "need" to counteract the discrimination based on an actual injury to the organization? Likewise, it is not helpful to talk about injury to a fair housing organization's "mission." HOME's complaint in the *Havens Realty* case did not allege injury to HOME's "mission." *Havens Realty* specifically recognized that a mere "setback to the organization's abstract interest" does not support standing. *Havens Realty*, 455 U.S. at 379 (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).

Furthermore, there is no evidence at all to suggest that Mr. Combs' alleged misconduct adversely affected FHOM's "mission" by increasing the number of people in need of counseling, reducing the effectiveness of FHOM's outreach efforts, or making FHOM's overall task more difficult in any meaningful sense. (See Respondent's Brief, pp. 20-21.) Mr. Combs operated one 18 unit apartment building in a county which had, according to FHOM's statistics, 37,433 rental units in 1994. (ER 183.) It is "implausible" that discrimination at a single housing complex could give rise to a "distinct and probable injury" throughout a metropolitan area or county. *Havens Realty*, 455 U.S. at 377. Moreover, a fair housing organization cannot claim it has been injured under facts such as presented in this case when the organization is funded *for the specific purpose* of investigating and prosecuting those who allegedly discriminate. FHOM has no legally protected interest in not using its resources for the very purpose those resources

[4] "Injury in fact" is defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

were intended. See *Assoc. for Retarded Citizens v. Dallas County Mental Health*, 19 F.3d 241, 244 (5th Cir. 1994).

### E. FHOM Was Awarded Damages For Both Pre-Litigation Investigation And Prosecution Of This Lawsuit

The final section of Respondent's Brief (pp. 22-25) begins by discussing the different holdings in various Circuit Court decisions regarding diversion of resources based on pre-litigation investigation or litigation. This contradicts FHOM's argument in the previous section of its brief that there is no circuit conflict on the question presented here. Then, FHOM argues that this case "does not involve a diversion of resources to a pre-litigation investigation alone or a diversion of resources to expenses associated with litigation alone." (Respondent's Brief, p. 24.) The record is clear, however, that FHOM was awarded damages based on staff time for *both* pre-litigation investigation *and* prosecution of this action. (ER 157-161, App. 34.) Although Mr. Combs does not believe there is a legitimate distinction for the purposes of standing between pre-litigation expenditures and expenditures associated with the prosecution of lawsuits (because both are self-directed), if there is a legitimate distinction, it should have been taken into account by the lower courts.

## III. CONCLUSION

Respondent's Brief illustrates both the split of authority among the Circuit Courts and the common misinterpretation of the *Havens Realty* decision that are the basis for this petition. Respondent's Brief is also notable for what it does not dispute – FHOM does not contest that this issue is recurring and of great practical importance to fair housing organizations, tenants, and housing providers nationwide. Therefore, this petition ought to be GRANTED.

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